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JAMES H. McKENNEY,
Clerk

No. 138.

Brief of Daggs for Appt. (on M

Filed in the Dec. 6, 1899.

Supreme Court of the United States.

R. E. DAGGS,
A. J. DAGGS,
Appellants,

vs.

THE PHŒNIX NATIONAL BANK,
A Corporation, *Appellee.*

} No. 138.

Appeal from the Supreme Court of Arizona Territory.

Brief on Appellants' Motion to Pass and Continue this Cause and Place it at the Foot of the Docket.

The facts upon which this motion is predicated are stated in the motion paper.

There is no "certified rulings of the court below on the admission or the rejection of the evidence when excepted to" (or Bill of Exceptions) in the transcript of the record on file in this Court, nor on file in the court below, neither has a Bill of Exceptions ever been made by that court.

Appellants at the trial of this cause in the district court made their objections to the rulings of the court on the admission and rejection of evidence and duly took their exceptions at time when overruled, and such objections and exceptions are all in the record now on file in the Supreme Court of Arizona and have been ever since the appeal was allowed to this Court.

The Bill of Exceptions is a document that Supreme Court of Arizona in *Banc* must make and certify to this Court.

18 Stat. at Large, 27.
Haws v. Victoria Mining, etc., Co., 160 U. S. 303, reading page 313.

The appellants have a legal right to insist that the court below make and "certify the rulings of the court on the admission or rejection of evidence when excepted to" because this court will not review the rulings on the evidence without it.

Haws v. Victoria Copper Mining Co., 160 U. S., 303, reading pape 312, where this Court said:

"Under the act of April 7, 1874, C 80, 18 Stat. at Large, 27, our jurisdiction in appeal from the judgment of a Territorial Supreme Court is limited * * * to reviewing the rulings of the court on the admission or rejection of testimony when exceptions have been duly taken to such rulings."

Idaho, etc., Co., v. Brodbury, 132 U. S., 509, reading page 514.
San Pedro and Canon Del Agua Co. v. United States, 146 U. S. 120.
Tucker v. U. S., 151 U. S., reading page 170.
United States v. Bruttig, 20 How. 252.
Mammoth Mining Co. v. Salt Lake Foundry Co., 151 U. S., 447.

Runkle v. Bornbon, 153 U. S., 216, reading page 222.
Glenderslin v. New Mexico Mining Co., 161 U. S., 577.
Saline Stock Co. v. Salina Creek Co., 163 U. S., 109, reading page 118.
Harrison v. Perea, 168 U. S., 311.
Grayson v. Lynch, 163 U. S., 468.

Argument.

Appellants having done all in their power to obtain the Bill of Exceptions in this case, and the court below not having yet made it, nor refuse to make it, nor accepted the Bill of Exceptions tendered by appellants, nor refused it, and now having adjourned the court until January 6, 1900, and without such Bill of Exceptions appellants will loose all of their exceptions to the rulings of the court below on the admission or rejection of evidence.

It being the legal duty of the court below to make this Bill of Exceptions and appellants' legal right to have it, they insist upon it.

They, therefore, ask that this cause be placed at the foot of the docket and such time be granted, under the circumstances, as will be sufficient to obtain the Bill of Exceptions herein and bring it to this court that justice may be done.

A. J. DAGGS,
Attorney for Appellants.

No. 156

Brief of Points for

Filed Feb. 23, 1903.

IN THE

Supreme Court of the United States.

R. E. DAGGS, A. J. DAGGS,
Appellants,
vs.
THE PECOS NATIONAL BANK,
A Corporation, *Appellee.*
} No. 156.

Appeal from the Supreme Court of the Territory of Arizona.

Brief, Points, and Authorities of Appellants.

A. J. DAGGS,
Attorney for Appellants.

IN THE

Supreme Court of the United States.

R. E. DAGGS, A. J. DAGGS,
Appellants,
vs.
THE PHŒNIX NATIONAL BANK,
A Corporation, *Appellee.*
} No. 138.

Appeal from the Supreme Court of the Territory of Arizona.

Brief, Points, and Authorities of Appellants.

This is an appeal from a judgment of the Supreme Court of Arizona Territory affirming a judgment brought there by a writ of error from a judgment of the District Court of the Third Judicial District of the Territory of Arizona, in and for Mericopa County.

Abstract Statement of the Case, Showing Questions Involved and Manner in which they are Raised (Rule 21).

The facts out of which this litigation arose are:
That on November 28, 1894, the appellant, A. J.

Daggs, and appellee entered into two written contracts, the appellee offering to sell and the appellant purchasing of it two blocks of property.

CONTRACT NO. 1, EXHIBIT 1, PAGE 69 RECORD.

Appellant, A. J. Daggs, gave his three promissory notes, aggregating $9,741.72, secured by three mortgages on real and personal property described therein, two of which were executed on the separate property of appellant, A. J. Daggs, and one was executed as surety by appellant, R. E. Daggs, on his separate property, the notes being signed by appellant, A. J. Daggs, alone. Appellant, A. J. Daggs, also pledged personal property, not mentioned in either of the three mortgages, water stocks of the value of $4,000, to secure the three promissory notes. In consideration of aforesaid notes, etc., the appellee sold and assigned, transferred and set over to appellant, A. J. Daggs, that certain promissory note executed by W. A. and P. P. Daggs as partners, and W. A. and P. P. Daggs as individuals, to Thomas Armstrong, Jr., and then owned by the appellee, for $5,000, and said $5,000 note was reputed to be secured by chattle mortgage on personal property in Coconeno County, Arizona, and it was expressly stipulated that these said three notes were taken in full payment and satisfaction by appellee for the said $5,000 note aforesaid.

It was agreed further in the same contract that said $5,000 note was then in litigation between Hugh McCrum, of San Francisco, California, v. W. A. and P. P. Daggs, defendants, and The Phœnix National Bank, appellee, as intervenor, and D. A. Abrams, assignee of The Bank of Tempe, Arizona Territory, to determine the priority of right under their several mortgages, each covering same property as mentioned on said note as under chattle mortgage to secure the $5,000 note. The suits at that

date, November 28, 1894, having been already tried in the District Court of Coconeno County, Arizona, and held against The Phœnix National Bank, the appellee, and the property given to Hugh McCrum, of San Francisco, California, from which judgment The Phœnix National Bank, the appellee, had taken its appeal to the Supreme Court of Arizona, which said appeal was then pending in the Supreme Court of Arizona Territory, and which litigation over the $5,000 note and the priorities of mortgages was also sold and assigned and transferred to the appellant, A. J. Daggs, for the above three promissory notes.

It was also agreed and stipulated in the same contract that the above litigation between the respective parties thereof, to determine the priority of rights to the property under the respective mortgages, should be continued in the name of the said The Phœnix National Bank, appellee, until such suit was finally determined and settled, and that after November 1, 1894, the cost of that litigation should be paid by appellant, A. J. Daggs, and that appellee should pay costs prior to that date.

This $5,000 note and interest above described, and the litigation over it to determine the priority of the several mortgages over the property securing it, constituted part of the consideration of the $9,741.72 notes, and was all sold and assigned and calculated and put into the three notes sued on at $5,200.

The suit of Hugh McCrum v. W. A. and P. P. Daggs, partners and individuals, and The Phœnix National Bank, the appellee, as intervenor, and D. A. Abrams, assignee of The Bank of Tempe, to determine the priority of their several mortgages covering the property mentioned in the contract of sale first referred to, was affirmed by the Supreme Court of Arizona Territory, the appellee having lost the suit in both the District and Supreme

Courts of Arizona, and there all the property under the chattle mortgage mentioned on the $5,000 note was lost, and the security to the $5,000 note given to Hugh McCrum, of San Francisco, California, under his first mortgage. After which A. J. Daggs, appellant, under the first contract, attempted to take an appeal from the Supreme Court of Arizona Territory to the Supreme Court of the United States, and upon his request to The Phœnix National Bank, appellee, to allow its name to be used in carrying on the suit to the court of last resort, it refused to allow its name to be used to take the appeal, or to allow its name to be used in the appeal, and refused to sign the bond on the appeal. After which appellant, A. J. Daggs, requested the appellee to allow him credit on the three notes sued on for the $5,000 note, and interest and credit was refused.

CONTRACT NO. 2.

The other part of the consideration of the three notes in suit consisted in an overdraft, together with the collaterals attached thereto, then held by the appellee against The Bank of Tempe, Arizona Territory. That overdraft and collateral were sold and assigned, calculated and put into the three notes at $4,541.72, being all the claim the National Bank, appellee, held against the overdraft and collateral attached. This overdraft and collateral attached was sold and assigned, and the three notes taken in full payment therefor without recourse on The Phœnix National Bank, appellee, and there is no dispute in this record about that part of the consideration, it especially exempting itself from liability on that part of the consideration of the three promissory notes, but there was no exemption on the part of appellee in the sale of the $5,000 note, both contracts being entered into, signed,

and delivered on the same date, November 28, 1894. This overdraft and collateral contract is not properly in the record. Appellee filed a motion in Supreme Court, Arizona, asking to be allowed to file a paper claimed to be evidence that the District Court allowed him to put in, among which is an overdraft account and a contract (See Record, pp. 104, 105), but there was no suggestion of diminution of the record and his motion was never ruled on.

Complaint.

Thereafter, and on February 21, A. D. 1896, the appellant filed a complaint in the District Court of Mericopa County, Arizona, as Case No. 2554, charging the failure of the payment of the said three promissory notes of A. J. Daggs aforesaid, and asking to foreclose the mortgage executed by R. E. Daggs, the surety, on his separate property. Thereafter, on February 25, A. D. 1896, appellee filed another suit on the same three promissory notes, asking to foreclose mortgage on one of the blocks of property on which A. J. Daggs had executed a mortgage. On the same date the appellee filed another suit on the same three promissory notes and asked to foreclose the other mortgage given by A. J. Daggs on his separate property. In neither of the three suits was the $4,000 water stocks pledged to secure the three notes mentioned, nor never offered for sale.

Answers.

To the first complaint of the plaintiff in case No. 2554, the appellants answered separately, first, by general demurrer and general denial, and afterwards, on October 12, 1896, filed amended answers. The surety, R. E. Daggs, filed his separate amended answer to appellants' first com-

plaint, in which amended answer he raised four separate and distinct propositions:

First. He charged that the three notes sued on were tainted with usury in that the interest charge of 10 per cent. on said notes exceeded the rate allowed by the National Banking Act, Sec. 5197, Rev. Stat. U. S., and inasmuch as no rate of interest was fixed by the laws of Arizona Territory, the United States Statute alone governed, and only 7 per cent. could legally be charged, and by virture therefore of Rev. Stat. U. S., Sec. 5198, applied and by reason of doing the illegal Act the appellee Bank could not enforce that part of the contract against him, and prayed that he be relieved from the payment of any interest on said three notes.

Second. The surety, R. E. Daggs, also charged that $4,000 worth of water stock had been pledged to appellee by the appellant, A. J. Daggs, the principal debtor, which stock had been converted by appellee, and no credit given for them on the three notes, and asked that the appellant be compelled to credit the $4,000 on the three notes.

Third. The securety, R. E. Daggs, further charges that at the time he gave his mortgage to secure the three notes it was understood and agreed that a certain $5,000 note, giving its description, the same heretofore described in contract No. 1, was a part of the consideration of the three notes sued on, and that said $5,000 note was in litigation, which it was contracted, should be carried on in the name and by assistance of the appellee until same should be merged in judgment and collected and applied on the three notes in satisfaction thereof, and that he gave his mortgage as securety on that understanding ; that the appellee had wholly failed to allow its name to be used, or allow the action to be carried on in any manner, and had refused to sign the bond on appeal required by law as principal, and by reason thereof he was discharged

as surety, as the property securing said note was then and thereby lost.

Fourth. That appellee had sold and assigned to his co-appellant that certain $5,000 note above described, and took in full payment therefor the three notes sued on; that at the time of the execution of the mortgage by appellant surety, it was expressly understood that appellee was liable as assignor on the $5,000 note, and upon failure to collect the $5,000 note which was then in suit, it was understood that appellant surety should not be liable for more than the difference between the $5,000 note and interest, and the three notes sued on; and further charged that the makers of the said $5,000 note at the date of the execution of the mortgage as securety by appellant, were, and ever since have been notoriously insolvent, and have no property out of which an execution could be satisfied, all of which was well known to appellee; and asked that the $5,000 note and interest be applied in liquidation of the three notes sued on, and that appellant take nothing by his suit against this appellant and for costs and for general relief.

Which answer was duly verified and filed on the 12th day of October, A. D. 1896.

Appellant, A. J. Daggs, in his separate amended answer, charged:

First. That the three notes were tainted with usury, for that appellee had charged 10 per cent. interest, wherein by the law of the land, Rev. Stat. U. S., Secs. 5197 and 5198, allowed only 7 per cent. to be charged where no rate of interest was fixed by the law of any State or Territory, and that no rate was fixed by the laws of Arizona, and that the offending appellee had committed the illegal act and forfeited its right to enforce the collection of any interest whatever on the notes; and asked judgment accordingly.

Secondly. He also sued the appellee on the $5,000 note sold and assigned to him as a counterclaim, charging that the appellees were indebted to him on the $5,000 note according to its tenor and effect (describing it); that it had been sold and assigned to him by written assignment for a valuable consideration on November 28, 1894, to wit: the three notes sued on and that they were taken in full payment therefor; that at the date of sale and assignment of said note, the makers thereof, were, and ever since have been, and are now actually and notoriously insolvent, all of which the plaintiff appellee well knew at the date of the sale; that no part of the note had been paid since the assignment; and there was now due the sum of $7,076.91 and prayed judgment against the appellee according to the tenor and effect of the said note.

Thirdly. For another answer this appellant sued appellee for breach of a written contract and upon an account, and alleged:

That appellee, by written contract (copy being attached) as part of the consideration of the three promissory notes, had sold and assigned, and expressly stipulated, that the three said promissory notes should be received in payment for all its right, title and interest, in and to that certain chose in action wherein Hugh McCrum was plaintiff, and W. A. and P. P. Daggs, as individuals and as partners, defendant; and appellee was intervenor, and D. A. Abrams, assignee of the Bank of Tempe, of Tempe, Arizona, was intervenor over that $5,000 note and chattle mortgage.

That at the time of the sale and assignment of the chose in action involving the $5,000 note and mortgage, the makers of said note were actually and notoriously insolvent, which the plaintiff well knew; that it was further agreed and stipulated that said litigation aforesaid should be carried on in the name of the appellee, until said cause should be

finally determined and settled, and that appellee should pay all costs prior to November 1, 1894, and that appellant A. J. Daggs, should pay all costs accruing thereafter. And that appellant further alleged that he had paid out $45.65, as a transcript fee from the lower court, that accrued prior to November 1, 1894, and that he had expended the sum of $500 as costs, and expended labor and work to amount of $500 and duly performed all the conditions of said contract on his part, but the appellee had failed and refused to perform the conditions of the contract on its part in this: That it had wholly failed and refused to pay the transcript fee that accrued prior to November 1, 1894, for $45.65; that it had wholly refused to allow its name to be used to carry on the suit to court of last resort; and that it had wholly failed and refused to sign the bond on appeal to damage of appellant, A. J. Daggs, in the sum of $10,122.55, and asked judgment accordingly.

Fourthly. Appellant then, for another action against the appellee, alleged that appellee had converted $4,000 worth of water stock pledged by him to it as collateral security to the said three promissory notes; that appellee had refused to give any account of the water stocks or their value, and refused appellants dominion over them, and had converted them to its own use and benefit—to his damage—in the sum of $4,000, and prayed judgment accordingly, which amended answers were duly verified and filed November 12, 1899.

Trial was had on October 12, 1896, as the pleadings stand above, before the court without a jury, there being no reply whatever to any one of appellants suits, or at all.

Appellee introduced its three notes, bearing 10 per cent. interest, and the two mortgages of appellant, A. J. Daggs, without objection, but the mortgage given by the surety was objected to on the ground it had been muti-

lated after it had been signed, which objection was overruled and exception taken, and appellee rested its case.

Appellant introduced the $5,000 note and the written contract of assignment of it to him, and offered evidence tending to prove the actual and notorious insolvency of the makers of the said note at the date of the sale and assignment, and that the appellee well knew it. This note being confessed by failure to reply.

Appellant, on the breach of contract, proved that the appellee had refused to carry on the said suit, or allow its name to be used to carry on the suit, and it admitted that it had refused to sign the appeal bond, one of the papers on appeal, to carry on the suit, the note ($5,000) was in to prove the damages. Appellant, on conversion, proved that appellee had refused to recognize the rights of appellant to water stocks of the value of $4,000, and refused to allow the exercise of the right in the canal to the water stock, and refused dominion over the stock, and refused to foreclose or sell the stock, and claimed to own them; but on the trial, said by its counsel, that to refute the allegation of conversion it would deposit the water stocks in the clerk's office, and when the debt was paid they would return them to the appellant.

The surety relied on the same evidence to show his burdens increased, and likewise his release on his contract of suretyship.

He also offered to prove that it was agreed between the surety and appellee that the $5,000 note, when collected from the McCrum suit, should go to liquidate the three notes in suit, and should that suit fail, then credit should be given on the three notes for the $5,000 note and interest. This offer to prove was by the court denied.

Before the trial begun on October 12, 1896, the appellants moved the court to bring in Thompson Walker, *et al.*, parties having or claiming an interest in the prop-

erty, which motion was by the court overruled. After the trial had been continued, at the request of the appellee, over the objection of the appellant, the following papers were filed:

Appellee supplemental complaint. In which it charged that it had purchased four tax sale "certificates," and alleged that such certificates were a lien on the mortgaged property, and asked judgment and foreclosure of lien for same. Filed October 16, 1896.

To which supplemental complaint appellant moved to dismiss on ground of no notice, and objected by general demurrer that the supplemental complaint did not state a cause of action, and also filed a general denial. Filed October 24, 1896.

Which motion and demurrer was on the 25th day of October, 1896, overruled and exceptions taken.

On October 24, 1896, the appellants filed motion for judgment on the pleadings for the reason that the counterclaim was confessed; that no reply had been made to the counterclaim and no answer at all.

Which motion was overruled on October 26, 1896, and exceptions taken, and the court gave the appellee thirty minutes to file a reply and the following reply was filed:

Appellee singled out the counterclaim as shown by the pleadings, which called the action on the $5,000 note a counterclaim, the other actions not using that designation, and filed its reply by general demurrer that counterclaim did not state cause of action, and also by general denial to the same counterclaim its demurrer was overruled by the District Court.

The point is that an unverified general denial is no reply to a varified counterclaim on a promissory note and that even after this kind of reply the $5,000 note stood confessed on the pleadings as well as proved in the record and there was no issue on it to be tried. Having singled

out this counterclaim, left the other verified actions without any reply whatever, and the trial again proceeded over the objections of the appellant, A. J. Daggs, who made his objection throughout that there was no reply; and there was no issue be be tried as made by the pleadings, which was as often as made, so often overruled. Exceptions taken.

A second trial was had October 27, 1896, whereupon the cases No. 2554, 2555, and 2556 were consolidated by agreement in open court, and that the evidence in case No. 2554 should be considered all the evidence under objections in the other two cases, and that the notes, mortgages, and tax receipts, evidence of payment of taxes in cases Nos. 2555 and 2556, should be considered in evidence under objections as they stood on the record.

Judgment was rendered October 12, 1896.

Motion for a new trial was made and filed on October 14, 1896, and overruled March 20, 1897, whereupon case taken by writ of error to the Supreme Court of Arizona Territory, where the judgment of the lower court was affirmed on different grounds, and an appeal taken here by allowance of appeal by a justice of this court June 6, 1899.

Amended Assignment of Error.

Come A. J. Daggs and R. E. Daggs, the appellants above named, and defendants, and respectfully say that there is manifest error in the record and proceedings in the above entitled cause, in this, to wit:

The court erred in affirming the judgment of the court below for the following reasons:

Assignment of Errors.

ERROR NO. I.

The court below erred in holding and decreeing that a national bank could charge, reserve, and collect any rate of interest whatever on any contract in the Territory of Arizona, where no rate of interest is fixed by law; and that the making of such a contract was not *ultra vires*. It should have held that a national bank could not charge, reserve, or collect a rate of interest to exceed the rate of 7 per cent. in Arizona Territory, and if it did charge a rate in excess of 7 per cent., it forfeited its right to collect any interest on that contract in any manner or at all; and the appellee having charged the rate of 10 per cent. per annum on the contract sued on in this case, it had forfeited its franchise right to collect any interest whatever on the notes in this suit.

ERROR NO. II.

The decree is further erroneous and the court below further erred in holding and decreeing that in effect there was a rate of interest fixed in Arizona Territory at 7 per cent., without further holding that a national bank was limited to that rate, and the appellee having charged a rate of 10 per cent. per annum on the contract sued on, had forfeited its franchise right to collect any interest whatever on the notes sued on. It should have held that there was no rate of interest fixed by the laws of Arizona Territory, and that a national bank could not charge to exceed the rate of 7 per cent. per annum on any contract in Arizona; and having charged a rate of 10 per cent. per annum it had forfeited its right to collect any interest in this case.

ERROR NO. III.

The court below further erred in holding and decreeing that the appellants' counterclaim in this case based on the $5,000 note, did not state facts sufficient to constitute a cause of action, for the reason that appellants did not allege in their bill that due diligence had been used to collect the said note from the makers thereof. The court below should have held that the counterclaim based on the $5,000 note did state a cause of action, because it is expressly alleged in such bill that the makers of the said note are actually and notoriously insolvent, and were so at the date of the sale and assignment of the said note, which was well-known to the appellee; and proceedings against them would be more than useless, which allegation took the case out of the operation of the requirement of the due diligence statutes. It should have held also that suit had been prosecuted against the makers of the said note by appellant in the name of appellee to the Supreme Court of Arizona, where the same was lost and nothing recovered against the makers of the said note or from the foreclosure of the mortgage securing the same, and that no further diligence was required of the appellants.

ERROR NO. IV.

The court below erred in not holding and decreeing that the counterclaim of the appellants based on the $5,000 note sold and assigned to them by appellee, stated a cause of action properly alleged, duly verified and also proved by appellee, and should have given judgment in favor of appellants and against the appellee, according to the tenor and effect of the said note.

ERROR NO. V.

The court below further erred in holding and decree-

ing that the view taken by it was strengthened because the appellants' bill stated on the face of the note the phrase, "Secured by chattel mortgage of even date herewith," for the reason that it is expressly alleged by the appellants, and shown in the record, that the makers of the $5,000 note were at the date of the sale and assignment, and are now, actually and notoriously insolvent, and the appellee well knew this fact; and it is also alleged in the pleadings in this case, and proved in the record, that a suit was pressed by appellant in the name of appellee against the makers of the said note, and to foreclose the mortgage covering the property mentioned in the said phrase, to final hearing in the Supreme Court of Arizona Territory; and in that case in that court judgment went against the appellee and the property was lost and the appellee refused to follow the suit further, and no further diligence could be used, and appellants are suing the appellee as one of their counterclaims in this suit for the breach of its contract, causing a loss of that very property, and in refusing to carry on the suit against the makers of the said note.

ERROR NO. VI.

The court erred in not remanding the cause to the District Court when the court below reversed the action of the District Court in overruling the appellee's demurrer to the appellants' counterclaim on the $5,000 note; and in affirming the judgment for the reason that the Supreme Court of Arizona thereby defeated the right of appellants to amend their bill by an insertion of an allegation showing that due diligence had been used. For that should the appellee's demurrer been sustained, instead of overruled by the District Court, appellants could and would have amended their complaint by the insertion of an allegation that judgment had been recovered and execution

issued against the makers of the $5,000 note and the execution has been returned *nulla bona* and wholly unsatisfied.

ERROR NO. VII.

The court below erred in holding and decreeing that the appellee recover judgment on its supplemental complaint, for the reason that neither of said supplemental complaints state facts sufficient to constitute a cause of action against appellants, or either of them, for the reason that neither of said complaints allege or show that the so-called tax sale certificates were ever filed with the Court Recorder so as to become a lien on the property mortgaged.

ERROR NO. VIII.

The court below erred in not holding and decreeing judgment in favor appellants and against the appellee for damages on account of breach of written contract, wherein appellee agreed to pay costs of the suit mentioned in said contract prior to November 1, 1894; and in refusing to sign the bond on appeal to the Supreme Court of the United States, and which it confessed as follows (during the trial counsel for appellee, Mr. Eugene S. Ives, in open court, said): "We admit we refused to sign your bond." And also in refusing to allow its name to be used in carrying on the suit over the $5,000 note and for foreclosure of the chattel mortgage securing the same, by reason of which the chance to recover the property covered by the said mortgage and the same property mentioned in the phrase on the note, "Secured by chattel mortgage of even date herewith," was lost to appellants and the $5,000 note thereby rendered worthless.

Error No. IX.

The court below erred in not holding and decreeing judgment in favor of the appellants and against the appellee on the appellant's action, based on the conversion by appellee of the $4,000 worth of water stock held by appellee as collateral security to the three notes sued on, for the reason that such cause of action was properly stated, duly verified and proved by legal and proper evidence; and no answer was made thereto. The court should have given judgment in favor of the appellants for the full amount of this claim, the conversion being admitted by Mr. Eugene S. Ives, counsel for the appellee, in open court, as follows: "A creditor can pursue whatever security he may have, there is an answer here, and under the answer of A. J. Daggs, it is to the effect that we have converted these water rights. We are ready to deposit these with the clerk, and, after our notes are paid and satisfied, they may be delivered; if not satisfactory they may be returned to us. We make that offer to do away with the allegations of conversion. We have a perfect right to pursue any course we please, but we are perfectly willing to deposit them with the clerk of the court, and, in case this property satisfies our note, they will be returned to the parties."

Error No. X.

The court below erred in not holding and decreeing that appellant, R. E. Daggs as surety, was discharged from any and all liability on the three notes sued on; for the reason that appellee had breached its written contract with appellant, A. J. Daggs, to carry on the suit by it against the makers thereof, wherein the chance to recover the property securing the $5,000 note was lost and the note rendered worthless as against the makers, and in

breaching its contract, pay the transcript fee that accured prior to November 1, 1894, and for the further reason that appellee refused to give credit on the three notes sued on for the value of the $5,000 note; and for the further reason that appellee converted to its own use and benefit the $4,000 worth of water stock pledged as collateral by appellant, A. J. Daggs, the principal on the three notes and refused to give credit therefor.

ERROR NO. XI.

The court below erred in not rendering judgment for the appellant and against the appellee upon the appellant's motion for judgment, and in overruling the said motion, said motion should have been sustained on the ground set forth in said motion, to wit: "Because the counterclaims are confessed by the plaintiff (appellee); second, because there is no reply to the defendants' (appellants') counterclaims."

ERROR NO. XII.

The court below erred in overruling appellants' motion suggesting a defect of parties and asking that appellee bring in Thomas Walker, P. B. Carley, J. H. Guyer, Henry Schmidy, W. H. Nye and Thomas Argue, who have, or claim to have, some interest in the mortgaged property, to the end that the title of the mortgaged property might be cleared. The court should have sustained said motion.

ERROR NO. XIII.

The court below erred in not holding and decreeing that the $5,000 note sold and assigned by appellee to appellant, and calculated in as part of the consideration of the three notes sued on, had been rendered worthless by

the appellee and that part of the consideration of the three notes had failed.

ERROR NO. XIV.

The court below erred in affirming the judgment of the District Court in this: that it foreclosed the mortgage given by the surety, R. E. Daggs, on all the north one-half of the south-west quarter and the south one-half of the north-west quarter and the north-west quarter of the north-west quarter of section 10, Township 1 north, Range 5 east, of Gila and Salt River base and meridian without further description, for the reason that said property is not described in any county, State or Territory and has no status.

ERROR NO. XV.

The court erred in refusing to allow the surety to prove his complaint and excluding the following evidence:

Question. "You may state, Mr. Daggs, the agreement upon which you mortgaged your property as security for A. J. Daggs, appellant."

"Plaintiff objects to the question."

By the Court: "What is the purpose of this?"

By Mr. Daggs: "The defendant offers to show by this witness that he gave the mortgage on his property to secure the payment of these three promissory notes upon the express agreement with James A. Fleming, president of the Phœnix National Bank; that the litigation over the $5,000 note assigned to A. J. Daggs should be carried on in the name of the Phœnix National Bank and pressed to judgment and settlement, and, when the money in the litigation was obtained, it would go to liquidate and satisfy the three promissory notes sued on, for which he gave his mortgage to secure."

" Plaintiff objects to the question."

" Objection sustained."

" Defendant excepts."

By Mr. Daggs: " The defendant offers further to prove that if the note was not collected that it should be returned and the full amount of it turned and credit given on the three promisory notes and that R. E. Daggs should not be liable for any more than the difference between the $5,000 note and interest, and the three promissory notes sued on."

" Plaintiff objects to the offer to prove."

" The objection sustained."

" Defendant excepts."

Error No. XVI.

The court erred in admitting the mortgage executed by the surety, R. E. Daggs, over the following objection: " Defendant objects to the introduction of the mortgage on the ground that it has been mutilated after it had been signed."

" Objection overruled and defendant excepts."

" The same is duly admitted and marked Plaintiff's Exhibit F. The full substance of the portion of the mortgage evidence claimed to be illegal is as follows: (After setting forth the following description,) " also all the north one-half of the south-west quarter and the south one-half of the north-west quarter and the north-west quarter of the north-west quarter of section 10, Township 1 north, Range 5 east, of Gila and Salt River base and meridian." Following this description is the mutilation complained of: " Containing in all two hundred acres more or less, with all water rights or shares thereto appertaining situated, lying and being in Maricopa County, Arizona Territory, with all water rights thereto apper-

taining." (Which was erased by pen scratches through it.)

ERROR NO. XVII.

The court erred in admitting the following oral testimoney concerning the contents of the written contracts No. 1 and 2, over the objection of the appellants under the notice marked C. H. H., as said notice in nowise shows what instruments are referred to and contains no description of any instrument and that the said evidence disputes the written contracts.

Notice C. H. H. is as follows:

PLAINTIFF'S EXHIBIT C. H. H.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE TERRITORY OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA.

2554, 2555, 2556.

Phœnix National Bank,
Plaintiff,

vs.

Daggs, *et al.*,
Defendants.

To A. J. Daggs, Attorney for defendants:

Please take notice that you are hereby required to produce upon the trial of the above-entitled actions all papers, bills of sale, assignments, promissory notes, letters, and memoranda affecting the issues in the above-entitled actions, or relating to the circumstances thereof, which are in the possession, or under the control of yourself or the defendants, or any of them, and in default of your produc-

ing such papers the plaintiff will introduce parole testimony as to the contents thereof.

L. H. Chalmers and Eugene S. Ives,
Att'ys for Plaintiff.

Under the above notice the court allowed the following oral evidence over objection to be introduced :

MR. L. H. CHALMERS,

a witness duly called, sworn according to law and examined upon his oath, testified as follows :

Examination by Mr. Ives.

Q. Were you the attorney for the Phœnix National Bank pending the negotiations resulting in the execution of the notes, which are the subject-matter of this action ?

Defendants object to the introduction of any further testimony in this case by this witness pertaining to their litigation, for the reason that there is no issue between the defendant A. J. Daggs and this plaintiff.

Objection overruled by the court and defendants except.

Mr. Ives. We want to put in evidence the notice to produce papers that I have served on the attorney for the defendants.

By the Court : Very well.

By the reporter : I have forgotten the number of exhibits already offered in this case, but will identify this with my own initials. Same was thereupon duly admitted and identified as plaintiff's exhibit C. H. H.

By Mr. Ives : I have asked that they produce the assignment by the Phœnix National Bank to A. J. Daggs of certain notes, which, together with the note which has been discussed before your Honor, form the consideration for the three notes, the subject-matter of the suit.

The one note which they set out as a counterclaim was a part of the consideration for the three notes which we are suing on. This bill of sale transferred other securities

which we have. One note formed all of the consideration and I have asked them to produce the original bill of sale delivered to them at that time ; and I now again ask them and they refuse to produce it, and I ask the court to allow plaintiff to prove the contents of it by this witness.

By the Court: Very well, go ahead.

A. By Mr. Chalmers: With respect to the contents of that bill of sale—

(Interruption) Defendants object to their proving the contents of that (contract of sale) notice because their notice is not a sufficient notice to produce papers as in the case of ——— v. ——— (Counsel for defendants reads authority to the court, whereupon the court overruled the objection and defendants except).

By Mr. Daggs: I object to the introduction of that testimony, for the reason that it is secondary evidence,and because no notice as required by law has been served upon the defendants, further, that there is no issue upon that proposition.

We admit that part of the consideration—there is no issue about that part of the consideration, why now are they entitled to produce the evidence before this court?

Objection overruled and defendants except to the ruling of the court.

Q. Do you know any addition, Mr. Chalmers, to the agreement in evidence between the Phœnix National Bank and A. J. Daggs, with respect to the McCrum matter? Was there any other paper in the nature of a bill of sale or assignment that was delivered by the Bank to A. J. Daggs?

Witness. Yes, sir. Generally I know the contents thereof. There was a copy of it made at the same time, and that paper is in my possession.

Plaintiffs offer the same in evidence.

Defendants object to the introduction of the copy as the original is the best evidence·

By the Court: Have you it with you?

A. I have.

Q. Allow me to see it?

Continued by the Court: That calls for three notes, $7,000, $4,000 and $3,000—made by A. J. Daggs to the order of R. E. Daggs. Did you ever see those notes?

A. Yes, sir. When they were in the possession of the Phœnix National Bank the endorsement of R. E. Daggs was on them.

Mr. Ives: Certain water rights were given as collateral security for the three notes, subject-matter of this suit?

A. Yes, sir.

Defendants object to the question as leading.

Witness: At the time when those notes and mortgages signed, I know what was the condition of the title to these water rights.

Defendants object to this testimony as immaterial.

Objection overruled, exception taken.

Witness: There was litigation affecting them; and the Phœnix National Bank was aware of it when it accepted them as collateral security. It took them at this time subject to the knowledge of the litigation.

Defendants object to the testimony as immaterial.

By the Court: When that was signed and delivered, who got it?

A. This is a part of and contemporaneous with the assignment that all of this talk has been about. In the settlement—the settlement was a general clean up of all the stuff the Phœnix National Bank held against the Daggs, and the bank agreed to give them back everything that they at that time held and took these three notes with the water rights in consideration of it.

The Daggs had previously drawn a contract up where they claimed a guarantee and I had drawn up this, covering all the other notes.

By the Court: That refers to the other three notes, but not to this $5,000 note?

A. No, sir, it refers to all the other stuff.

By the Court; Then that exhibit can be admitted and filed in the other case. (Same heretofore identified as C. H. H.)

Mr. Ives: That is all.

ERROR NO. XVIII.

The court erred in proceeding with the second trial of the cause on October 26, 1896, and the whole thereof over the objection of the appellant, A. J. Daggs, for the reason that no reply having been filed to the verified causes of action there was no issue to be tried under the theory of the pleadings.

ERROR NO. XIX.

The court erred in not sustaining the objection of the appellants to the so-called statement of facts, as follows: "Comes R. E. Daggs and A. J. Daggs and files this their exceptions and objections to the so-called 'Statement of Facts in the Nature of a Special Verdict'" on the following grounds:

1. Because said statement is not a statement of facts and is not based on the evidence in the case.

2. Because said statement is not a compliance with Sec. 1868 R. S. U. S., and the amendment of April 7th, 1874.

3. Because the court refused to make a statement of facts or to make and certify to the rulings on the evidence, or to pass on the motion to have the same made, certified and filed *nunc pro tunc* and refused to adopt the statement and objections and exceptions to evidence as prepared by appellants and tendered the court, which appellants now again herewith tender and ask to have the same adopted and filed as a part of this record.

4. Because the full record of the evidence containing all the evidence was on file in this court as a part of the record in this case, and the court refused to make a statement of facts in the case from such record or in accordance with such record, or to adopt statement prepared and herewith again tendered, and filed as part of the record in this case.

5. Because the assignment of error set out in said findings is not the assignment set out in appellants' brief as it purports to be.

Dated this 1st day of November, 1899.

ERROR NO. XX.

Because the so-called statement of facts made by the court below will not, and does not, sustain the judgment and is not a statement of fact in the nature of a special verdict.

ERROR NO. XXI.

The court erred in not adopting the statement of facts tendered by the appellants, for the reason that the same is a true and correct statement of the facts of the case in the nature of a special verdict.

And whereas, by the law of the land, the said judgment ought to have been given for the said appellants and against the said appellee, the said appellants pray the judgment aforesaid be reversed, annulled and altogether held for nothing, and that they be restored to all things which they have lost by occasion of the said judgment, and that they have judgment in their favor upon the whole case according to their counterclaims and according to the right and justice of the case.

Brief and Argument.

We shall argue the case in the order of the amended assignment of error.

ERRORS I AND II ARGUED TOGETHER.

It is admitted on the face of the pleadings that appellee has charged 10 per cent. per annum interest on the three notes sued on, and judgment has been rendered therefor by the court below. This is assigned as error. Appellants contend that under the National Banking Act, U. S. Sec. 5197 and 5198 and under the laws of Arizona Territory, the appellees cannot receive, reserve, or charge on any loan, note, bill of exchange, or other evidence of debt, interest at a greater *rate* than 7 per cent. per annum, that much and *no more.*

The interest laws of Arizona Territory and the whole thereof are as follows: Page 338, Title XXXVIII Interest. Approved March 10, 1887. Rev. Stat. A. T. Par. 2161 Sec. 1. "When there is no express agreement fixing a different rate of interest, interest shall be allowed at the rate of seven per cent. per annum on all moneys after they become due on any bond, bill, promissory note or other instrument in writing, or any judgment recovered in any court in this Territory for money lent, for money due on any settlement of accounts, from the day on which the balance is ascertained and for money received for the use of another."

Par. 2162, Sec. 2. "Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due on any contract; any judgment rendered on such contract shall conform thereto, and shall bear the rate of interest agreed upon by the parties, and which shall be specified in the judgment."

The first paragraph (2161) of this statute of the Territory of Arizona allows 7 per cent. interest on contracts

after they become due, where no rate has been fixed by the contracting parties. Under this section there is no limitation, no rate fixed above which parties cannot contract.

Paragraph 2162, Sec. 2, allows parties to contract for any rate of interest whatever, there is no limitation, no rate fixed above which they cannot go. Under this law the notes sued on were contracted.

If there is a rate fixed by these statutes it is 7 per cent. because that is the only *rate* of interest therein mentioned. If this is true, and the appellee having charged 10 per cent. it follows that the appellee has charged more than the rate allowed by the Territorial law of 7 per cent. and hence has committed the usurious act under the U. S. banking law and forfeited its right to collect any interest whatever on the notes sued on.

If there is no rate fixed by the Territorial law then the United States statute furnishes the complete answer and says where no rate is fixed by the laws of the Territory, then the National Bank can charge only 7 per cent. per annum ; and having charged 10 per cent. per annum has committed the act of usury and the penalty is that it has forfeited its franchise right to collect any interest on the three notes in suit.

Revised Statutes of the United States, Pars. 5197 and 5198.

The doctrine then is, where there is a rate of interest fixed in any State or Territory the national bank can charge the rate so *fixed* and *no more*. But where no rate is fixed, a national bank can charge just what its charter provides, 7 per cent., and no more, and if the national bank violates either view of the law, it forfeits its franchise right to collect interest. The doctrine thus announced is already settled in this court in favor of appellants.

A case on "all fours" will be found in National Bank v. Johnson, 104 U. S., 271, where the case of Tiffany v. National Bank of Missouri, 18 Wall, 412, is commented on and explained in favor of the above doctrine.

An analysis of Sec. 5197 and 5198 will be found in Farmers and Mechanics National Bank, 91 U. S., 32, where the same doctrine is announced.

In Danforth *et al.* v. National Bank of Elizabeth, 48 Federal, 271, it is said of Par. 5197 and 5198: "The clause operates directly upon the bank and effects its power. The statutory franchise to recover interest is lost by the commission of the illegal act. Being without power to demand interest, the offending bank cannot recover interest from any one."

Brown v. Marion National Bank, 169 U. S., 416.
Johnson v. National Bank of Gloversville, 74 N. Y., 499.
Hall v. National Bank Banne, 15 Fed. Rep., 432.
In Re Wied, Fed. case 17,645, 11 Blackford, 243.
National Bank of Madison v. Davis, Fed. case 10,038.
First National Bank v. Duncan, Fed. case 4,804.
Peterbourough National Bank v. Childs, 130 Mass., 519; 133 Mass., 248.
Croker v. First National Bank, Fed. case 3,397, 8 Bis., 103.
1 Thompson, National Bank case 350.
Central National Bank v. Pratt, 115 Mass., 539.
Tomblin v. Higgins, 53 Neb., 92.
National Bank v. Lewis, 81 N. Y., 15.
National Bank of Lafayette County v. Dusbane 96 Pa. St., 340.
Shafer v. First National Bank, 53 Kan., 614.
First National Bank v. Stauffers, 1 Fed. Rep., 187.
Alves v. Henderson Nat. Bank, 89 Ky., 126.
Boener v. Bank, 90 Texas, 443.
Smith v. Shelton, 90 Texas, 447.
Farmers' Bank v. Hale, 59 N. Y., 53.

National Bank v. Eyre, 52 Iowa, 114.
Merchants' and Farmers' Nat. Bank of Charlotts v. Meyers, 74 N. C., 514.
Union National Bank v. Louisville Ry. C., 145 Ill., 208.

Many other cases might be cited on same point.

Again we are aware that in certain quarters of the West a contrary doctrine seems to have sprung up, upon which the court below rested its decision.

Hinds v. Marmalego, 60 Cal., 229.
Bruhn v. Bank, 64 Texas, 152.
Gould v. Bank (S. D.), 57 N. W. Rep., 499.
Packwell v. Bank (Colo. App.), 36 Pac., 905.

An examination of all these cases show that they are based on each other, and then all based on a conclusion jumped at by them, purporting to find countenance in the case of Tiffany v. National Bank of Missouri, 18 Wall., 412, where it was said by this court that where the statute had fixed two rates, one for banks of issue and a higher rate fixed for natural persons, that the national bank could charge the higher rate so fixed, because the higher rates so fixed was the rate allowed to natural persons. These Western courts jumped at the conclusion that if a natural person can contract for any rate, so can a national bank and cite Tiffany v. National Bank of Mo., *supra*, as authority.

This court has cleared the mists away from this conclusion in National Bank v. Johnson, *supra*, by the use of this language about the case of Tiffany v. National Bank, *supra*. The "sole particular in which national banks are placed on an equality with natural persons is as to the *rate* of interest and not as to the character of the contract they are authorized to make, and that rate thus ascertained

is made applicable to both loans and discounts, if there be any difference between them." "It is not intimated or implied that if in any State a natural person may discount paper without regard to any rate of interest fixed by law, the same privilege is given to national banks. The privilege only extends to charging some *rate* of interest allowed to natural persons which is fixed by the State law."

The most subtile of the lot is the California case 60 Cal., 229, where an attempt is made to construe the United States Statute in the light of the local statutes, and say the word fixed in the U. S. Statute is to be construed as meaning the same as allowed. Its fallacy is easiest exposed by placing the word allowed in the sentence where fixed appears, "where no rate is *allowed* by the laws of the State or Territory * * * the bank may take * * * seven per centum." This would leave the national bank as the only party allowed to collect interest in such State or Territory.

These western authorities exposed and out of the way leaves our position on this point unchalenged by authority and we believe correct.

The three following assignments of error will be argued together, III, V and VI.

These three assignments will be argued together as they cling around the demurrer used by the court below of its own motion to strike down the counterclaim of appellants based on the $5,000 note.

It must not be overlooked that the appellee struck at this counterclaim with the same demurrer in the District Court (Record, page 46), the complaint was held good in the District Court.

The court below assumed a theory not made by the pleadings of appellant on the $5,000 note as a counterclaim and then struck the counterclaim down, because under the theory thus assumed, the bill did not state a cause of action.

Its theory assumed was that appellant was attempting to hold the appellee as a *surety* on the $5,000 note, when the appellants bill shows the suit is leveled at appellee as a principal under a different statute and a different theory. The body of the complaint (omitting formal part), is (Record, page ~~2~~ 24 and 5), as follows:

This defendant, for another answer and counterclaim to plaintiff's comp aint, alleges:

First. The plaintiff is indebted to this defendant upon a certain promissory note executed by W. A. and P. P. Daggs, as co-partners, and by W. A. and P. P. Daggs, as individuals, and delivered to Thomas Armstrong, Jr., and assigned by said Thomas Armstrong, Jr., in blank to the plaintiff, and said note was on the twenty-eighth day of November, A. D. 1894, for a valuable cons deration in writing, assigned by the plaintiff to this defendant, and at the date of said assignment the makers of said note were, ever since have been, and are now notoriously insolvent; all of which plaintiff well knew; which note is in words and figures as follows, to wit, marked "Exhibit A," and made a part hereof:

No. 1340. Due Sept. 1st.

$5,000.00. PHŒNIX, ARIZONA, *July 1st*, 1893.

On the 1st day of September, 1893, without grace, we or either of us, for value received, promise to pay to Thos. Armstrong, Jr., at the Phœnix National Bank, at their office in Phœnix, Arizona, five thousand dollars ($5,000.00) in the United States gold coin, with interest, at the rate

of 1 and ¼ per cent. per month, until paid. In case of legal proceedings hereon we or either of us agree to pay ten per cent. of amount due hereon as attorneys fees.

W. A. and P. P. DAGGS.

Secured by chattel mortgage of even date herewith.

W. A. DAGGS.
P. P. DAGGS.

And endorsed on the back as follows: "Thos. Armstrong, Jr. Sept. 30th, 1893, interest from July 1st to Oct. 1st, 1893, $187.50. Dec. 30th, 1893, interest from Oct. 1st, 1893, to Jan'y 1st, 1894, $187.50. April 2nd, 1894, interest from Jan'y 1st, to April 1st, $187.50."

Second. And no part of said note has been paid since the said assignment by the plaintiff to this defendant, and there is now due thereon the sum of seven thousand and seventy-six and 91–100 dollars ($7,076.91).

Wherefore the defendant prays judgment against the plaintiff for the sum of seven thousand and seventy-six dollars and 91-100 ($7,076.91) and costs of suit, the value of said note and interest thereon according to the tenor and effect of said note.

It is seen this complaint ignores the idea of a surety. Ignors the idea of due diligence to fix the liability of a surety, but sues the appellee as a maker of this note on the theory that the makers were notoriously insolvent, which appellee well knew when appellee assigned the note and appellee become by its assignment *ipso facto* principal on the note, and the question of suretyship and due diligence was never in this case. The question is not whether an assignor of a solvent note or chose in action under the statutes of Arizona, can be held as a surety without due diligence to collect such note from the maker or chose in action. But the question raised by

this complaint is: Is the assignor who assigns an insolvent note, well knowing it to be insolvent, liable on his assignment as a maker, as the principal; is it his debt?

Under the latter theory this bill was drawn, that it was the debt of the assignor at the moment of assignment and by virtue thereof. It was its credit that gave the note life. Its credit gave the note commercial activity. Appellees assignment transformed this non-negotiable note from insolvent to solvent paper.

The sections of the Arizona Statute governing the theory under which this bill was drawn and governing such contracts are as follows:

Art. 122. "The obligor or assignee of any written instrument, not negotiable by the law merchant, may transfer to another, by assignment, all the interest he may have in the same."

Art. 126. "Assignors indorsers and others not primarily liable upon any of the instruments named in this title, may be jointly sued with his principal obligors or may be sued alone in the cases provided for in "sections thirty-nine and forty of acts concerning proceedings in civil suits."

Section 40 of acts concerning "proceedings in civil suits" is as follows:

Art. 788, Sec. 40. "The assignor, indorser, guarantor and surety upon any contract, and the drawer of any bill which has been accepted, may be sued without the necessity of previously or at the same time suing the maker, acceptor or other principal obligor, when he resides beyond the limits of the Territory, or in such part of the same that he cannot be reached by the ordinary process of law, or when his residence is unknown and cannot be ascertained by the use of reasonable diligence, or when he is dead, or actually or notoriously insolvent."

The latter section controls the remedy to reach an as-

signor when the maker of a note is insolvent, the words "without the necessity of previously, or at the same time, suing the maker," give the right where any of the following conditions exist regarding the maker of note.

1st. "Where he resides beyond the limit of the Territory."

2d. "Or in such part thereof that he cannot be reached by the ordinary process of law."

3d. "Or when his residence is unknown and cannot be ascertained by use of reasonable diligence."

4th. "Or when he is dead."

5th. "Or actually insolvent."

6th. "Or notortiously insolvent."

Notorious insolvency existed at time of assignment. There was nothing left to be done to complete the right to sue the assignor. The contract (Record, p. 69, Defendant Ex. 1) shows the makers of the note were insolvent. They could not pay their notes, three suits in court foreclosing three mortgages each seeking priority, hanging to them like millstones grinding them to dust. Appellee had lost its reputed first mortgage in the District Court and appealed. It then sold this note and litigation; the contract shows this (Record, p. 69), and agreed to stand up and carry the suit on in its name. The case was tried in the Supreme Court of Arizona and held adversely to the appellee in appellants' suit against the makers of the $5,000 note (Record, p. 62). The appellee then fell down and refused to let its name be used any farther to carry on the suit, refused to sign the bond, and would have nothing more to do with the suit (Record, pp. 60, 61, 62, 131), where Mr. Ives, counsel for appellee, said, "we admit we refused to sign your bond." Appellant then demanded payment of the $5,000 note, and was refused (Record, p. 63). Appellant spent over $500 in money and $500 in services prosecuting the makers of the $5,000 note (Record, pp. 59, 60, 123); followed it to the Supreme Court

of Arizona, and would have went further, but appellee refused to let its name be used and he was compelled to stop. Appellant then demanded credit for the $5,000 note (Record, p. 63). How much more diligence would the court below have, possibly have the debtors bodies taken in execution? With all this record before it the lower court say no diligence was used to collect. We say all the law requires, even on the theory of the lower court, all that a reasonable man would do, was done. The lower court would have the appellants now bring a suit against the makers of this note, and re-dragnet the dregs of insolvency, to satisfy its conception of due diligence.

The mortgage in this litigation was the same as mentioned in the phase on the note (Record, page 64), when appellant had exhaused all good faith he sued the national bank, on whose guarantee he relied at the date of sale and assignment. (See Record, pp. 63 and 64.)

That there was property under the chattle mortgage that could it have been reached would have possibly satisfied the note, but in the suits to establish the priorities of mortgages between three different ones the national bank lost and then fell down and refused to go further and left appellant. (Record, page 64.)

Insolvency of the makers did not happen then, it had happened long before the assignment. The makers could not pay appellee, simply the last chance to reach the property mentioned on the note was exhausted, other mortgagees got it.

Due diligence was used by suit. The last vestige of property was beyond reach. The makers were notoriously insolvent. And under Art. 788, Sec. 40, Revised Statutes of Arizona, *supra*, the appellants founded their cause of action. They also sue here for breach of the contract for failure of appellee to allow their name to be used in carrying on the suit, and for their money back for carrying on the suit. All this was before the court below.

Appellants contend further that their theory is not only correct under the statute but that it is the settled law of Arizona Territory, that when the allegation of insolvency is made it takes the case out of the operation of the line of decisions requiring due diligence to collect it from the maker, and no allegation of due diligence is required and that no demurrer will reach it on that ground.

These statutes were adopted from Texas, in 1887, verbatim. as follows;

Art. 266. "The obligee or assignee, of any written instrument not negotiable by the law merchant, may transfer to another, by assignment, all the interest he may have in the same."

Art. 270. "Assignors, indorsors and others not primarily liable upon any of the instruments named in this title, may be jointly sued with his principal obligors or may be sued alone in the cases provided for in articles 1207 and 1208."

Art. 1208. "The assignor, indorser, guarantor and surety upon any contract, and the drawer of any bill which has been accepted, may be sued without the necessity of previously or at the same time suing the maker, acceptor or other principal obligor, when he resides beyond the limits of the State, or in such part of the same that he cannot be reached by the ordinary process of law, or when his residence is unknown and cannot be ascertained by the use of reasonable diligence, or when he is dead, or actually or notoriously insolvent."

Rev. Stat. Texas, 1879.

This Act was first passed in 1840, while Texas was yet a Republic, and when Texas, in 1845, became one of the States of the Union it retained its statute.

Laws of Texas, Vol. 4, p. 144.
Act. January 25, 1840.

It reappears in Paschals digest of 1873, Art 771, 772, was revised and reappears in the form above quoted in Revised Statutes of Texas, 1879, and was adopted by Arizona in 1887. Again under Texas decisions.

The demurrer of the court below admits the bill, and must survive or perish on the theory of the bill and on no other theory.

By an unbroken line of decisions in Texas for nearly 60 years, the Supreme Court of Texas has held that the allegation of insolvency takes the case out of the operation of the line of decisions requiring due diligence, and that a bill, alleging actual or notorious insolvency, is good against a demurrer, on the ground it did not state facts sufficient to constitute a cause, for the reason due diligence was not alleged.

The Supreme Court of Texas and the Court of Appeals of Texas have concurred in the same view in holding that the allegation of insolvency takes a case out of the operation of the due diligence statute. That when the maker is or becomes insolvent the assignor is thereby rendered primarily liable. He becomes the principal debtor. It is his debt, and no allegation of diligence is necessary.

In Texas Court of Appeals civil case, Johnson v. McDonald, 1 White & Wilson, 576, case No. 1013, it is held: "It is well settled that if the makers are notoriously insolvent the indorser is primarily liable and may be sued at any time before the cause of action is barred."

In Insoll v. Robson, 16 Texas, 128, was a case where insolvency had been alleged and a demurrer in the district court sustained, because the bill did not state cause of action, for that it was not alleged that due diligence had been used to collect the note from the makers. The averment was that the maker was at the time of the endorsement and ever since notoriously insolvent, and the Supreme Court of Texas said, per Wheeler, J:

"The assignor, or indorser, may be sued without the necessity of previously suing the maker when he is 'notoriously insolvent.'

"If the insolvency of the maker will dispense with the necessity of suing him at all, in order to hold the indorser liable, it, of course, must dispense with the necessity of suing him at the first term of the court. It is the suing of the maker which fixes the liability of the indorser unthe statute; and where that is unnecessary, it cannot be necessary to sue the indorser himself to the first term, in order to fix his liability. The deligence prescribed by the statute, as a substitute for that repuired by the law merchant, is the suing of the maker, not the indorser (Hart. Dig., Art., 2520, 2528). The statute does not require that the indorser shall be sued at the first term of the court. The fact of the makers insolvency renders the indorser liable at once; and if his liability is fixed, so that he may be sued in the first instance, without suing the makers, the omission to sue at the first term is an indulgence to him of which he cannot complain. He cannot object that he was not sued as he might have been, nor can he complain, that the maker was unnecessarily joined in the suit. He will be entitled to the benefits of the judgment against the maker, if anything can be made of it. We are of opinion that the court erred in sustaining the demurrer and dismissing the cases to the defendants in error" and reversed the case.

"The insolvency of the maker of the note was a sufficient excuse for not having first or simultaneously sued him."

Gayson v. Taylor, 14 Texas, 675.

In Texas Court of Appeals, 1 White & Wilson, page 697, Sec. 1215, where notorious insolvency was alleged and the Court of Appeals of Texas was asked to look into the rule that allegation of insolvency took the case out of the due diligence statute, and review the decisions of Supreme Court, and it said: "We prefer that law on this

subject shall remain settled as they have settled it. It is well-known, works no injury and there could not be the slightest reason for changing it."

Cambell v. Wilson, 6 Tex., 379.
Baily v. Heald, 14 Tex., 226, 675.
Dent v. Swift, 11 Tex., 278.
Insoll v. Robson, 16 Tex., 128, 456; 18 Tex., 128.
Fisher v. Phelps, 21 Tex., 551.
Hendricks v. Alexander, 31 Tex., 694.
Stratton v. Johnson, 36 Tex., 90.
Burroys v. Yapp, 69 Tex., 474.
First National Bank v. Bonner (Civ. App.), 27 S. W. 698.
Hunt v. Wiley, 1 White & Wilson Civ. Ct. App. 1215.
Oglesby v. North Dallas Imp. Co. (Civ. App.), 28 S. W., 1016.
Texas Civ. Ct. App., 1 White & Wilson, No. 764, page 420.

The following was a case where the party was insolvent at the date of assignment.

Platzer v. Norris & Co., 38 Tex. 1.

These statutes construed and settled by the highest court of Texas, hold an assignor, where insolvency exists, is a principal and not a surety, and no diligence is required to fix his liability, for the very best reason it is his debt, and a general demurrer would not lie on the ground that due diligence was not alleged.

This was the settled construction of this statute by the Supreme Court of the State of Texas, when in 1887, it was adopted into the Revised Statutes of Arizona, and Sec. 1208 of Revised Statutes of Texas, 1879, appears verbatim in the Revised Statutes of Arizona Territory as Art. 788, Sec. 40, Practice act. On this section and construction appellants hang their rights.

It thereby became the settled law of Arizona Territory, under the rule of *stare decisis.*

Identity of language of statutes determine the identity of their construction in the State or Territory of their adoption.

Black Interpretation of Law, 33.
Metropolitan R. R. Co. v. Moore, 121 U. S., 558.
Cauter v. Stafford, 48 Fed., 268.
Black on Interpretation of Laws, 159, and long line of decisions there cited.
Douglas v. Pike, 101 U. S., 677.
Taylor v. Yksilanti, 105 U. S., 72.
Carroll v. Carroll, 16 How., 275–286.

Wells and Fisher v. Eastern Trust & Banking Co. 67 U. S.

The adoption of a statute adopts the silent construction thereof.

"A different construction ought not to be adopted if thereby the policy of the act is subverted or its material provisions defeated."

McDonald v. Hovy, 110 U. S., 619.

Warner v. Texas and Pac. R. R. Co. 64 U. S. 418-423.

Stare decisis applies with equal force on adopted statutes as the rule in the same State would on a statute originating there.

Block on Interpretation of Laws, 413.
Cooley Constitutional Limitations, 52.

In Cathcart v. Robison, 5 Pet., 280, where Chief Justice Marshall, speaking of English decisions, when an English Statute was adopted here, said: "By adopting them they became our own as entirely as if they had been enacted by the legislature."

In German Bank v. Franklin County, 128 U. S., 526, it is said: "After a statute has been settled by judicial

construction, becomes so far as contract rights are concerned, as much a part of the statute as the text itself and a change of decision is to all intents and purposes the same in effect on contracts as an amendment of the law by means of a legislative enactment."

Douglass v. Pike, 101 U. S. 677.

The contracts made in this case were made under the statute as it stood November 28, 1894, as quoted above, and the construction placed thereon by an unbroken line of decisions for nearly 60 years by the highest court of Texas from whence the statute was adopted. The appellant's rights were complete. The Supreme Court of Arizona could no more silence the decisions of the Supreme Court of Texas, construing that statute, than it could strike down the statute itself.

The legislature could not repeal this statute so as to deprive the appellants of their rights and their remedy.

Where a statute was adopted from Massachusetts into California and in the latter State construed differently from the construction placed thereon by the Supreme Court of Massachusetts, the same statute was thereafter adopted from California into the Utah Territory Statute. Upon appeal in a case from Utah Territory, to this court, the question was which would this Court follow, the construction by California or Massachusetts, and this Court followed the rulings of Massachusetts on the original construction by the Supreme Court of Massachusetts.

Coleman v. Daull, 133 U. S., 216.
Norton v. Shelby, 118 U. S., 425.

A *fortiori* this Court will follow the rulings and construction of the statute of the Supreme Court of Texas in this case, in preference to the wrong rulings of the Supreme Court of Arizona Territory.

Therefore, under the rule of *stare decisis*, the court below was wrong in holding that the complaint in this case alleging notorious insolvency did not state a cause of action, because it did not state that due diligence had been used to callect the note from the makers thereof.

Can evidence aliundi be used to aid a demurrer? Can resort be had to an exhibit to the bill?

The court below not itself satisfied with the soundness of its decision sought to shield the error behind a resort to Exhibit A, in the bill in which it is said "secured by chattel mortgage of even date herewith." Whatever this phrase may be moulded into, the appellee by its general denial, denied it, and should it be said to mean property, then no property being shown the appellee must prevail. There was no property. There is none. If then exhibits to the pleading is to be resorted, why not look and see that when this phrase appears, whatever it may mean, appalee denied it.

On general demurrer every reasonable intendment arising upon the pleadings excepted to will be indulged in favor of its sufficiency.

47 Texas, 619.
Preuit v. Farris, 5 Texas, 371.
Banks v. Watson, 48 Texas, 107.
Johnson v. Dowling, 1 App. C. C., Sec. 1094.
Sulivan v. Iron-Silver Mining Company, 109 U. S., 550.
Pullman Palace Car Company, v. Missouri Pac. R. Co., 115 U. S., 587.
Victoria v. Clyde, 86 N. Y., 384.
Stone v. Day, 69 Texas, 13.

A demurrer admits the facts well plead, as well as what may be reasonably implied therefrom.

Milligan v. Westers Union Telegraph Company, 110 N. Y., 403.
Phœnix National Bank v. Acland (Sup. Ct.), 34 N. Y. St. Rep., 497.
Waldon v. Crig, 14 Pet., (U. S.), 152.
Tyler v. Hand, *et al.*, 7 How., 573.
Darrow v. Home Produce Company, 57 Fed. 463.
Lyons v. McCrackin, 10 Fed. 664.

Demurrer cannot be aided by extraneous matter.

Robbins v. National Stock Yards, 20 Blachf., 664.

An exhibit is no part of a pleading and cannot aid a demurrer, nor be objected to by demurrer. It is not an allegation of fact.

Fed. case 4834.
Fed. case, 10469.

Exhibits form no part of the complaint and cannot be considered in determining its sufficiency on demurrer.

Curry v. Lackey, 35 Mo., 392.
Pomeroy v. Fullerton, 113 Mo., 440.
Burkett v. Griffith, 90 Cal., 540.

Demurrer must prevail or fall on the face of the pleading to which it is directed.

Clark v. Halt, 16 Ark., 257.
Rust v. Frothingham, 1 Ill., 32.
American Ins., Co., v. Replagle, 114 Ind., 1.
Dearmond v. Balleau, 122 Ind., 398.
State v. Simpkins, 77 Iowa, 678.
Polk County v. Hurb, 37 Iowa, 363.
Cassett v. Vogal, 14 Mo. App., 317.
Brown v. Worden, 44 N. J. L., 177.
Coe v. Beckwith, 19 How. Pr. (N. Y. Sup., Ct.), 404.

Modgeburg v. Wihleiu, 53 Wis., 165.
John Putzler & Company v. Carlson, 76 Wis., 33.
Valdon v. Craig, 14 Pet. (U. S.), 152.

The pleader must make under the code "a full clean statement of his cause of action."

An exhibit may be evidence of a contract, but its term can not take the place of allegations of its legal effect.

Guadalupe County v. Johnson, 1 Texas Civ. App., 715.

Filing an exhibit takes the place of profect at common law and if they vary, no advantage can be taken of it by demurrer.

Penrose v. Pac. Ins. Co., 66 Fed., 253.

Some States require written contracts to be filed with the pleading, as an exhibit. In such States it would be ground for a demurrer should a written contract be pled and not filed. Where these laws exist an exhibit is a part of the pleading by operation of law, by virtue of the statute making it such.

Where such statutes do not exist, an exhibit can not be used to assist a demurrer.

A case comes to this court from the State of Illinois, where such a statute is in force, and this court held that in such case the exhibit was a part of the bill by statute, and could aid the demurrer.

Norvoo v. Retten, 97 U. S., 391.

The converse would be true where no statute existed.

Norvoo v. Retten, 97 U. S., 391.

Speaking demurrers, founded on matters collateral to the pleading are bad, and should be overruled.

Cook v. De La Guerro, 24 Cal., 239.
Kann v. State, 74 Cal., 191.
State v. Putnam County, 13 Fla., 632.
Williams v. Davis, 46 Ill. App., 228.
Balt. Pk. Co., v. Riche, 31 Md., 198.
Dehamy v. Woodson, 100 Mass., 198.
Coe v. Beckwith, 19 How. Pr. (N. Y. Supreme Court), 398.
Van Glan v. De Rosset, 76 N. C., 292.
Wyoming Co., v. Bordwell, 84 Pa. St., 104.
Hust v. Conn, 12 Ind., 257.

There being no statute requiring an exhibit to be filed with the pleading in Arizona, the exhibit to the pleading under the code stood merely as evidence, collateral to, but no part of the allegations of the bill, and could not under any theory be used to assist the demurrer of the Supreme Court of Arizona. If the theory of the lower court was permissible, no case could arise in which due diligence would not be necessary to be alleged.

The theory of appellants under this statute is that in cases where insolvent paper is assigned the question of due diligence cannot arise.

In a case of the assignment of solvent paper due diligence is the defense of the surety and like any other surety he would be obliged to set it up and prove it or judgment would go against him. The law could give him a defense of due diligence before he could be held, but he must avail himself of it or let judgment go against him.

Due diligence elsewhere.

Adverting to the question of allegation of insolvency and the assignment of an insolvent note and knowledge of that fact at the time of assignment, as being sufficient to take the case out of the operation of another statute requiring *due diligence* to be used to fix the liability of the

assignor, we show that other courts have not been silent on the subject. In Davis v. Helm, 34 Mo. App., 332, Seymore D. Thompson, J. speaking of the Missouri statute, Sec. 665, where insolvency or non-residence is sufficient by statute to relieve an assignee from the necessity of suing the maker of a non-negotiable note as a condition to the fixing of the liability of the assignor, said: "The undisputed facts of non-residence excused the assignee from using due diligence in collecting the note from the maker by *terms of the statute* and took the case out of the operation of a line of decisions based on the statute requiring diligence."

Clemons v. Collins, 14 Mo., 604.
Ivory v. Carlin, 30 Mo., 142.
Boker v. Blodes, 23 Mo., 405.
Wells v. Boggs, 31 Mo., 124.

In Dick v. Hitt, 82 Ind., 92, Elliot, J., speaking of a case where the district court had held that the proof of no property subject to levy, was not sufficient to relieve due diligence, said: "If the conclusion reached below is correct, then in no case can a judgment be obtained against an assignor until one has been obtained against the maker, and the exemption claimed in the manner prescribed by law. This would entail needless expense, cause useless litigation and produce no good result. A rule likly to be productive of such consequences can not be a sound one."

In Camden v. Dormus, 15 Curtis, (U. S.), 540, Camden Pltf. in error, v. Dormus, 44 U. S., 515, it is said by this court "The diligent and honest prosecution of a suit to judgment with a return of *nula bona* has always been regarded as one of the extremest tests of due diligence" "This phrase and the obligation it imports may be satisfied however by other means. The ascertainment upon correct and sufficient proof of entire or notorious insolvency is

recognized by the law as answering the demand of due diligence and dispensing with the more dilatory evidence of a suit; evidence which in instances that it may be easy to imagine, might prove prejudicial alike to him who should exact and to him who would supply it."

Insolvency sufficient to excuse suit against maker.

It would be "idle to bring a suit against them."

Wills *et al.* v. Claflin, 92 U. S., 135.
Bank v. Weisiger, 27 U. S., 331 (2 Pet).
Fed. Case, 8330.
Fed. Case, 10839.
Fed. Case, 7212.
Dent v. Ashley, Fed. case 3809, b.
Lemmon v. Chateau, Fed. Case, 8239, a.
Simmons v. Wilson, Fed. Case 12658.

The measure of damages on recovery of an assignor on a non-negotiable note is the consideration paid and interest from the date of the assignment.

Missler v. Bogg, 31 Mo., 124.

Many other State cases could be cited in favor of the theory of appellants. This case stands on the most liberal doctrine of the liability of an assignor by the terms of the Arizona statute, Art. 788, 40. What can the assignor lose to be compelled to take back an insolvent note and give credit for it on solvent notes, secured by mortgage on real estate? It sold nothing, and gets back what it sold. It gets the benefits of whatever judgment that may be obtained against the makers. On the other hand, it will be able to go scot free with $10,000 worth appellants property, for which appellant will get nothing, as the statute of limitation would possibly cut appellant off from another suit against the assignors, should appellant be

shut out on this suit against the appellee; the makers being in a hopeless state of notoriously insolvency.

Insolvency.

Insolvency existed when the note was assigned, as shown by the contract of assignment (Rec. p. 69). This was well-known to all parties (Rec. p. 63.) The note was sold on the solvency of the bank as their note (Rec. p. 64.) It was then understood by all parties that the bank's guarantee went with the note (Rec. pp. 64, 124, 127), when Mr. Chalmers, attorney for the appellee testified: "Daggs' had previously drawn a contract up where they claimed a guaranty and I had drawn up this, covering all other notes." The appellee had assigned the over draft and the collateral notes without recourse on it (Rec. p. 104), but no such an exemption appears on the contract of the assignment of the $5,000 note (Rec. p. 69.) It was not intended that the bank should be liable for this note, but the bank changed owners and presidents. James A. Flemming was president when the assignment was made (Rec. pp. 51, 69), where his signature appears on the assignment.

Afterward, at the suit November 12, 1896, Mr. F. S. Belcher testified that he was president, and came in February, 1895 (Rec. p. 51). The notes were due, November 1, 1895. This suit was brought, February 21, 1896, about twelve months after Mr. F. S. Belcher came in. Rec. p. 6, shows the file-mark of this action.

Insolvency exists where a debtor cannot pay his debts as they become due in the usual course of his business.

Thompson v. Thompson, 4 Cush. (Mass.), 127.
Buchanan v. Smith, 16 Wall, 227.

Demurrer Sustained by Supreme Court.

The demurrer of the appellee was overruled by the district court, but the Supreme Court without mentioning that fact, of its own account, took up the same demurrer and held the counterclaim did not state a cause. It thus reversed the district court, but instead of remanding the cause, it affirmed the decision. This deprived the appellants of their legal right to amend their bill and save the cause of action.

When a demurrer is reversed in an Appellate Court the case then stands again in the lower court, subject to such practice and pleading as appears proper there.

United States v. Boyd, 15 Pet. 187.
Teal v. Walker, 111 U. S., 242, 472.

The practice act of Arizona was taken almost literally from the Texas Code, and is the most liberal in amendments to pleading.

Rev. Stat. Arizona, 1887, 667, Sec. 19. "All pleadings or proceedings may, upon leave of the court, be amended at any stage of the action upon such time as the court may prescribe, or they may be amended before trial without such leave, upon serving the adverse party with a copy of such amended pleadings or proceedings."

If the view of the lower court obtain, then the appellant has the right to amend his bill.

The court below say *due diligence* should be alleged.

The bald allegation of *due diligence* is not a composite statement of facts, but a mere allegation of a conclusion of law and would not help any pleading.

Leas v. White, 15 Iowa, 191.
Harrington v. Wilson, 2 Cranch., 37.

We have shown the bill sufficient under the settled law of Arizona Territory, as adopted from Texas under the rulings for nearly 60 years by the highest courts of Texas. We show the bill sufficient under the rulings of other States and the United States.

We have shown that the court below mistook the theory of the bill and injected a theory of its own, and held appellants bill bad on its theory.

We have shown that an exhibit cannot be used to assist a demurrer.

We have shown that the bill was held sufficient at the trial in the district court, and that ruling reversed by the Supreme Court and judgment affirmed, cutting off the right to amend.

We have shown by the proof in the pleadings and evidence the notorious insolvency of the makers of this $5,000 note.

We have shown that appellants prosecuted the makers of this note by suit in name of the appellee and spent over $500 in money and $500 in service, and would have went further but was prevented by appellee, and submit on this demurrer appellants should have judgment.

Error No. VII, stands as an error on the face of the Record proper.

The two so-called supplemental complaints (Rec. pp. 11, 19), do not state facts sufficient to constitute a cause of action. In both, the allegations are to the same effect, and say that appellee purchased tax sale certificate Nos. 100, 97, 98 and 128 of certain date, describing certain lands for territorial and county taxes, then use this allegation: "That said taxes were a lien upon the land, set out in the

complaint in this mortgage." In the other so-called supplemental complaint, the pleader used this language after describing land, and say: "The said tax certificate was a lien upon the land," without more or further allegations. Referring to the tax sale certificates, it is seen that they are not tax receipts for the payment of taxes, which is called for by the mortgage which says: "all payments" "on account of any taxes." They did not pay the taxes, but let the property sell and then voluntarily redeemed tax sale certificates from other persons.

Two points are made.

1. The allegation—that the tax sale certificate was a lien, is not an allegation of fact, but the bald averment of a conclusion of law, this is not sufficient. The code system is a pure fact system. He should state the facts entitling the paper to become a lien and the court will say whether *he has* a lien.

Frazier v. Thomas, 6 Ala., 169.
Keener v. Eagle Lake Land and Elec. Co., 110 Cal., 627.
Cairo R. R. Co. v. Canble, 85 Ill., 555.
Moore v. Cape Fear R. R. Co., 112 N. C., 236.
Merigan v. English, 9 Mont., 123.

2. It is not alleged that the originals of the so-called tax sale certificates were even signed by or filed with the proper officer so as to become a lien on the property.

The statute of Arizona controlling such matters is as follows: "The certificate must be signed by the collector and one copy delivered to the purchaser, and the other filed in the office of the recorder."

Sec. 12, Session Laws, 1893, p. 130.

The pleader should allege that the original tax sale certificate, a copy of which he was the owner, was signed

by the collector naming him and filed with the recorder, naming him of the county and Territory in which the property is situated.

These two steps must be taken before a tax sale certificates can ever become a lien on the property mentioned in it.

Section 14 of the same act is as follows:

"On filing the certificate with the county recorder the lien of the Territory vests in the purchaser."

It is not alleged or proved that the two prerequisites, essential to pass the lien from the Territory to the purchaser, has ever been complied with. They are neither alleged or proved, we therefore submit that the bald allegation that the purchaser of tax sale certificates has a lien is not a sufficient allegation in such cases to state a cause of action, the two statutory steps must be complied with, before a cause of action ever exists.

We will now proceed to show that the causes of action were confessed, and stand now confessed, on the face of the pleadings by the failure of the appellee to make proper reply to the counter claims, as required by the Statute of Arizona Territory.

Error IV, VIII, IX, Successively.

The counterclaim on the $5,000 note was duly verified. Appellee must reply thereto under oath, or it confesses the bill.

The court below compelled the appellee to file a reply (Record page 119). Appellee then filed a general demurrer and a general denial, not under oath to (Record, page 46), singling out the counterclaim of the $5,000.00 note,

because both demurrer and general denial are in the singular, and that was the theory in the district court. The action on the $5,000.00 note was the only one named a counterclaim on the face of the bill; the other two being called answers.

The Statutes of Arizona were rescripted from Texas and will now be here printed. Where the rule prevails that a failure to reply under oath, confesses the allegations of the bill, where the bill is founded in whole or in part on a written instrument.

Texas Rev. Stat., 1879:

"PLEADINGS OF THE PLAINTIFF."

Article 1196. "When the defendant sets up a counterclaim against the plaintiff, the plaintiff may plead thereto under the rules prescribed for the pleadings of defensive matter by the defendant, so far as the same may be applicable; and whenever under such rules the defendant is required to plead any matter of defense under oath, the plaintiff shall in like manner be required to plead such matters under oath, when relied on by him."

Rev. Stat. of Arizona Territory, 1887:

Par. 671, Sec. 23. "When the defendant sets up a counterclaim against the plaintiff, the plaintiff may plead thereto under the ruies prescribed for the pleading of defensive matter by the defendant, so far as the same may be applicable; and whenever under the rules the defendant is required to plead any matter of defense under oath, the plaintiff shall in like manner be required to plead such matter under oath, when relied on by him."

These Statutes are the same; under them, a plaintiff where a counterclaim is plead by the defendant is put in

the same attitude the defendant is in when he is sued by the plaintiff, and must reply under the rules of pleading, like the defendant answers the plaintiffs complaint. The only exception being in the following section, which does not apply to a counterclaim, nor to any of the defenses here set up.

672, Sec. 24, Rev. Stat. of Arizona, 1887. "It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted."

A counterclaim is not a special defense, it is an action in and of itself, and should the plaintiff dismiss his complaint the defendant would nevertheless recover on his counterclaim.

Rev. Stat. of Texas, 1879, Chapter eight:

PLEADINGS OF THE DEFENANT.

Article 1265. "An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit (omitting Sub. 1, 2, 3, 4, 5, 6 and 7, as not applying in this case, the section goes on.)

8. A denial of the execution by himself or by his authority of any instrument in writing, upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to have been lost or destroyed." (Omitting balance subdivision as not applying.)

"9. A plea denying the genuineness of the indorsement of the assignment of a written instrument as required by article 271."

Art. 271. "When a suit shall be instituted by any assignee or indorsee of any written instrument, the assignment or indorsement thereof shall be fully proved, unless the de-

fendant shall deny in his plea that the same is genuine, and moreover shall file with the papers in the cause, an affidavit stating that he has good cause to believe and verily does believe, that such assignment or indorsement is forged.

Art. 1265, Texas Stat., *supra*, proceeds:

"10. That a written instrument upon which a pleading is founded, is without consideration, or that the consideration of the same has failed in whole or in part."

"11. That an account which is the foundation of the plaintiff's action and supported by an affidavit, is not just, and in such case the answer shall set forth the items and particulars which are unjust."

Rev. Stat. of Arizona Territory, 1887, Chapter 8:

PLEADINGS OF THE DEFENDANT.

735, Sec. 87. "Any answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit (omitting subdivisions 1, 2, 3, 4, 5, 6, 7, as not applying)."

"8. A denial of the execution by himself or by his authority of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him or by his authority, and not alleged to be lost or destroyed."

"9. A plea denying the genuineness of the indorsement or assignment of any written instrument."

That while this subdivision don't refer to any section of the Arizona statute, the one corresponding to the one referred to in this subdivision in the Texas is as follows:

127, Sec. 9. "Where a suit shall be instituted by any assignee or indorsee of any written instrument, the assignment or indorsement thereof shall be regarded as fully proved, unless the defendant shall deny in his plea that

the same is genuine, and, moreover, shall file with the papers in the cause an affidavit, stating that he has good cause to believe, and verily does believe, that such assignment or indorsement is forged."

735, *supra*, subdivision 10. "That a written iustrument upon which a pleading is founded is without consideration, or that the consideration of the same has failed in whole or in part."

"11. That an account which is the foundation of the plaintiff's action, and supported by an affidavit, is not just, and in such case the answer shall set forth the items and particulars which are unjust."

These statutes show that when the appellee failed to reply under oath to this written instrument, or any written instrument where the cause of action is founded in whole or in part on a written instrument that it confessed the note; that it confessed the assignment.

That it must plead as the defendant would have to plead in such case to the complaint of the plaintiff, and not having done so it confessed the cause of action of appellant.

Where a note and account are set out in the same pleading, both are admitted by failure to deny under oath.

Dial v. Taylor, 8 Texas, 269.
Furguson v. Wood, 23 Texas, 178.
Austin v. Townes, 10 Texas, 30.
Fulshier v. Random, 18 Texas, 277.
Prince v. Thompson, 21 Texas, 481.

Unless the petition is denied under oath there is no issue on the execution of the note.

Pearce v. Bell, 21 Texas, 691.
Diew v. Harrison, 12 Texas, 281.

Proof of agency can only be required by plea under oath.

Reid v. Reid, 11 Texas, 592.

Where a cause of action is founded in whole or in part on a written instrument it must be denied under oath, or it will be taken as confessed.

Prince v. Thompson, 21 Texas, 481.
Fulshier v. Random, *supra.*
Parsons v. Frost, 25 Texas, Sup. 129.

This section dispenses with the proving of the execution of the instrument sued on where there is no denial under oath.

Armstrong v. Lipscomb, 11 Texas, 651.
Kinnard v. Herlick, 20 Texas, 48.
Robison v. Bronson, 20 Texas, 440.
Lewin v. Houston, 8 Texas, 96.
Able v. Chandler, 12 Texas, 88.
Motossy v. Frost, 9 Texas, 618.

This rule is held to apply in this court, as well as other jurisdictions, that bill is admitted by failure to deny it.

Deputon v. Young, 134 U. S., 241.
Frederica Dover v. Tyrell, 59 Cal., 97.
Cunningham v. Norton, 40 Pac., Rep. 491.

See also U.S. Cases page 69 this brief.

By overruling the appellees demurrer in the court below the district court adjudged the counterclaim sufficient, and there being no reply it stood confessed.

Wilson v. Hawthorne, 14 Colo., 532.
Pomeroy's Rem., Sec. 617.
Crater v. McCormick, 4 Colo., 196.
Tucker v. Parks, 7 Colo. 62.

Teller v. Hartman, 16 Colo., 448.
Frugus v. Tinkham, 38 Ill., 409.

Failure to deny is equivalent to confession.

McMillan v. Gambell, 115 N. Car., 352.

It is now shown that this cause of action was confessed and stood confessed on the face of the pleadings, and further than this, while the appellee was permitted to introduce evidence at the trial, if it could, to defeat the action on the $5,000 note, it did not introduce one single jot, tittle or squint of evidence to refute the collection of this $5,000 note, not one; and that the most searching review of this record will show that there is but one suspicion therein contained against the recovery on this note, and that is the eight words on the face of the note: "secured by chattel mortgage of even date herewith" and they were denied by the general denial of the appellee; and no evidence offered by appellee that there was property, but, on the contrary, the truth was shown by appellant, that there had been property under the mortgage referred to by this phrase (Record, page 64), and that it was in suit, and had been lost by an adverse decision (Record, page 62) to appellee in Supreme Court of Arizona. And that appellee fell down and refused to go further with that suit, and then the property mentioned by this phrase was lost by the fault of appellee. And the first mortgage, sold by appellee to appellant, turned out not to be a first mortgage. It sold that which it did not have.

That while the light of this evidence was before the court below it blinded its eye to it all and seined up this phrase, sawed the case off at that very point, and said: "This omission in the pleadings is doubly fatal, for the reason that the note appears, from an indorsement upon

its face, *to have been* secured by chattel mortgage of even date therewith."

This leaves the case standing admitted; proved; property under the chattel mortgage accounted for; makers insolvent suit prosecuted against them in the appellee's name by appellant to Supreme Court of Arizona; the bill stating a cause of action complete on its theory, and judgment should follow in favor of appellants. What was done by the court below? A different theory from the one set forth in the pleadings, was assumed. A demurrer that had been overruled in the district court, was taken up and without saying anything about the district court's action on the demurrer, that demurrer was sustained. The district court was reversed and the judgment affirmed, and then sawed the case off and sought to strengthen it by the above phrase. When it is understood there is nothing in the record for the appellee but this phrase, it is significant that the case was sawed off at that very point and a position taken that the assignment of error would not permit a further review of the case. All there was in the record for the appellee was in the phrase, "secured by chattel mortgage of even date herewith" and appellee denied this and this is used, plus an assumed theory of law to crush the whole three counterclaims of the appellants.

Appellants therefore submit that they should have judgment on the $5,000 note according to its tenor and effect, and should the assumed theory of the court below on the pleadings be thought by the Honorable Court to be correct, then the case ought to be reversed and allow such amendments to be made as will meet the demands of justice.

Assignment of Error No. VIII

is founded on the refusal of the court below to decree

judgment in favor of appellant on thier suit against appellee for the breach of a written contract.

The cause of action here referred to is founded on a written instrument (Record Page 113), for the breach of its terms (Record Page 25-43-111). There is no reply to this verified counterclaim by the appellee. It stands admitted, the argument produced under assignment ~~III~~, IV ~~and VII~~ *supra*, is of equal force in this assignment, and is here referred to as argument sustaining this counterclaim. It will be seen that the reply of appellee did not purport to reply to this cause of action, but singled out the cause of action mentioned as a counterclaim and answered that by general demurrer and general denial unverified (Record page 46), and as the reply is in the singular and addressed to the counterclaim, and as the only answer mentioned as a counterclaim is on the $5,000 note, the other two answers denominated simply answers. It is seen the appellee made no reply whatever to this answer. It stands as suit on a written instrument charged to have been executed by appellee "in whole," (subdivision 8, Sec. 87, Art., 735, Rev. Stat., Ariz., 1887, *supra*), its *execution* stands admitted under the terms of the statute. The *consideration* is (under subdivision 10 of the same act *supra*) also by the terms of the statute admitted. These two admitted then was the breach of the terms of the contract admitted as alleged, our contention is that it was, it was new matter and a counterclaim and under section 671 of the Arizona Statue, *supra*, the (appellee) plaintiff must answer as the defendant would have to answer the complaint of the plaintiff. If the defendant did not answer the complaint of the plaintiff at all, it would be a default, and all the plaintiff would be required to do would be to take default and take his judgment. Now, where a counterclaim is plead by the answer of the defendant, the plaintiff can reply to it in the same manner as the defendant answers the

plaintiff and if he fails as here, judgment goes against him the same as judgment would go against the defendant. This is the plain face of the statute.

If the defendant would have to answer under oath, so would the plaintiff have to reply to the counterclaim under oath. If the defendant would have to answer new matter, so would the plaintiff have to reply to the counterclaim of new matter. If by not answering, the defendant would suffer default, so would the plaintiff by refusing to reply to the counterclaim of new matter, or suffer a default, and thus upon the plain face of the statute, this suit stood on the pleadings admitted by failure of appellee to reply to this counterclaim of appellant.

The sole difference between the reply to the $5,000 note and the action for the breach of written contract is that replying to the $5,000 note would require the entire reply to be under oath, while in this action, part only need be replied to under oath, but the balance being new matter, it must reply somehow or such new matter will be taken as true and confessed.

The breach of contract is proper subject-matter for an action by counterclaim. Its new matter here growing out of the same transaction.

Rev. Stat. Ariz. Ter. ~~Article~~ 734, Sec. 86. The defendant in his answer may plead as many several matters, whether of law or fact, as may be necessary for his defense, and which may be pertinent to the cause, but such pleas shall be stated in the following order and filed at the same time:

"5. Matters of counterclaim and set-off."

Rev. Stat. Ariz. Ter. ~~A. T. Statute~~ 736, Sec. 88:

"Whenever any suit shall be brought for the recovery of any debt due by judgment, bond, bill, or otherwise, the defendant shall be permitted to plead therein any counter-

claim which he may have against the plaintiff, subject to such limitation as may be prescriced by law."

—738, Sec. 90. "On the trial of such issue, if the defendant shall establish a demand against the plaintiff exceeding that established against him by the plaintiff, the court shall render judgment for the defendant for such excess."

Bliss on Code Pleading, 374.
Preston v. Roberts, 12 Bush, Ky., 571.
Richards v. Hayward, 71 Mo., 560.

A failure to reply to the counterclaim is a solemn admission on the record and the court will not look to see whether such bill or answer is sustained by proof.

Moore v. Sanboro, 42 Mo., 495.
Hart v. Ins. Co., 21 Mo., 91.

On failure to file replication judgment goes for counterclaim.

Aston v. Wallace, 43 Ind., 468.
Aymer v. Chance, 12 Barb. (N. Y.), 301.
St. Louis v. Clemons, 36 Mo., 467.
Hubner v. Sheppard, 63 N. W. Rep., 892.

Where there is no replication new matter is taken as true.

Banks v. Manchester, 128 U. S., 244.
United States v. Dallas Military Road Co., 140 U. S., 599.
Harper v. Ross, 140 U. S., 71.
Roberts v. Perkins, 129 U. S., 233.
Fisoth v. Doolittle, 120 U. S., 73.
Depritson v. Young, 134 U. S., 241.
Stewart v. Barnes, 153 U. S., 456.

It is error to decide a case against the answer of the defendant not denied by a replication.

Gettings v. Burch, 9 Cranch., 372.
American File Co. v. Garret, 110 U. S., 288.
United States v. Buford, 3 Pet., 12.

Counterclaim admitted by failure to reply.

Toland v. Sprague, 12 Pet., 300.
Breedlove v. Nicolet, 7 Pet,, 413.
Randolph v. Bonnet, 16 Pet., 138.

Where declaration has two counts, plea to first one and that stricken out on trial, judgment should be given on the second one for want of a plea.

Hogan v. Ross, 13 How., 173.

"Where the ultimate fact is admitted on the record probative facts tending to establish, modify or over come it, are not the proper subjects of judicial action."

Mulford v. Estidillo, 32 Cal., 139.
Camp v. Lossen, 67 Cal., 139.
Walker v. Bren, 67 Cal., 599.

All the authorities here cited are applicable to the suit by counterclaim on the $5,000 note and *visa versa.*

It is a confession on the record by operation of the statute and also by the well-known rule of pleading that new matter must be answered or replied to or taken as confessed.

The statute puts plaintiffs in the same attitude in replying to a counterclaim as the defendant would have to answer to the complaint of the plaintiff's. Appellants insist they should have judgment upon the statute and authorities cited.

Assignment of Error No. IX,

relates to the $4,000 worth of water stock pledged as

collateral security to appellee, to secure the three notes sued on.

This is a suit for $4,000 worth of water stock, pledged as collateral security to appellee by appellant, for which it refused to account and converted the same. Record, pages 26-44-112, where the bill or complaint may be found. Conversion is the proper subject of a counterclaim.

Rev. Stat. of Arizona Territory, 1887, Art. 734-736 and 738, *supra:*

Johnson's Bliss on Code Pleadings, p. 374.
Maxwell on Code Pleading, 544.
Ainsworth v. Bowen, 9 Wis., 348.
Grand Lodge v. Knox, 20 Mo., 433.
Watson on Set-off, 616.
Daugherty v. Stamps, 43 Mo. 243.
Kisler v. Tinde, 29 Ind., 270.
McArthur v. Canal Co., 34 Wis., 139.
Walker v. Wilson, 13 Wis., 522.
Hall v. Gale, 14 Wis., 34.

The matter set up in the counterclaim is new matter and comes under the same rule as to new matter as Assignment No. VIII and IV, just argued and authorities there cited.

There was no pretense in the court below to answer this counterclaim, and no effort to disprove it.

The same rule of law obtains as to this counterclaim as obtains in the case of the $5,000 note under Assignment No. IV, and the breach of the written contract, Assignment No. VIII.

On the $5,000 note it is confessed if not answered under oath.

On the breach of written contract, if it is sought to deny its execution or its consideration, it must be under

oath, but all other new matter comes under the statute requiring a reply to new matter in counterclaim, as the defendant would be compelled to answer the plaintiff. And the conversion being new matter must be replied to some way, and if it is not it's allegations stand as true and judgment, as by default of the defendant, goes against the plaintiff under the statute and the usual rules of pleading.

The theory upon which the appellee proceeded, and upon which the District and Supreme Court of Arizona tried the case, was, that on the breach of the written ~~for~~ contract, and for the counterclaim of the conversion of the $4,000 worth of water stock, did not require a reply. In fact the counsel for the appellee contended there was no necessity to file a reply to any of the counterclaims, (Record, page 119) but the court gave "the parties thirty minutes to reply to the counterclaim."

Appellant contends that unless a reply was made to the counterclaims the same as a defendant would be compelled to answer the complaint of the plaintiff, under the statutes cited and quoted, *supra*, the same result would follow in either case, a default; matter confessed; and taken as true.

We submit we should have judgment on all three of the counterclaims according to the pleading.

That while the appellants went further and proved their three counterclaims, they, by that, did not strengthen the facts confessed. When a fact is confessed as true by the pleadings it becomes a solemn admission on the record, and if its proved a thousand times it cannot be made stronger.

Assignment of Error No. XI, Relates to Appellant's Motion for Judgment.

It follows from what has been shown *supra*, that ap-

pellants motion for judgement was proper motion, and should have been sustained. The plaintiff, under Arizona Statute *supra*, bears the same relation to the defendant on a counterclaim that defendant bears to plaintiff on his complaint, and there was no reply. No pretense was made no reply to anything but the $5,000 note. A general denial unverified is no reply to a promissory note. The other answers stood without a reply.

Miles v. McCallan, 1 Ariz., 491.
Hancock v. Herrick (Ariz., 1891), 29 Pac. Rep., 13.
Felch v. Beaudry, 40 Cal., 439.
Hicks v. Lovell, 64 Cal., 14.
San Francisco v. Staude, 92 Cal., 560.
Alvoid v. U. S., 1 Idaho, 585.
Bernard v. Haworth, 9 Ind., 103.
Hutchinson v. Meyers, 52 Kan., 290.
Fields v. Montmillon, 5 Bush. (Ky.), 457.
Loyd v. Secord, 61 Minn., 448.
McDonald v. Pincus, 13 Mont., 83.
Irish v. Pheby, 28 Neb., 231.
Malony v. Lamphear, 8 How. Pr. (N. Y. Sup. Ct.), 491.
Tooth v. Clifton, 22 Ohio State, 247.

The same rule obtains where the plaintiff fails to reply to defendant's counterclaim.

McKensie v. Farrell, 4 Bosw. (N. Y.), 142.
Brown v. Spear, 5 How. Pr. (N. Y. Sup. Ct.), 146.
Comstock v. Hollock, 1 Code Rep. N. S. (N. Y. Sup. Ct.), 200.
Stoop v. Greensboro, Pl. Co., 10 Ind. 47.
Perkins v. Bragg, 29 Ind., 507.
Schurmin v. English, 46 Minn., 306.
Hebner v. Shepherd, 5 N. Dak., 56,
Iva v. Cea. Assoc., 40 Pac. Rep., 527.
Watkins v. Southern Pac. R. R. Co., 38 Fed. Rep., 711.

Where a counterclaim is set up by defendant, and plaintiff fails to reply thereto, defendant is entitled to default.

St. Louis v. Clemmons, 36 Mo., 467.

It cannot be contended that appellant A. J. Daggs waived his motion for judgment on the pleadings. At time his motion was made there was no reply of any kind or character.

He made his motion, stood upon it and thereafter throughout objected that there was no issue to be tried, and refused to offer any evidence whatever on his part. This was no waiver. This court will order such judgment as the lower court should have given. This was a motion for judgment under the statute where no reply was made, as was said in the case of Post v. Parfit, 4 Wash., 369. Where no reply is made to new matter constituting a defense, a counterclaim motion is proper, even after a defective reply; and even if the appellant here had gone to trial on the general issue made by the unverified general denial made to appellants counterclaims still being insufficient he could insist on the right to judgment on his motion.

Nelson v. Wallace, 48 Mo. App., 193.
State v. Finn, 19 Mo. App., 560.

Appellant A. J. Daggs made the motion for judgment and stood upon throughout and contended and objected to all evidence on the ground of there being no issue, and refused to put in evidence, and hence did not waive his rights under it.

Accident Ins. Co. v. Cranball, 120 U. S., 527.

Surety Discharged.

Assignment of Error No X

Under the assignment of error No. X, the surety con-

tends he is discharged from his liability as a surety on the grounds:

1. Appellee had breached its written contract with his principal to carry on the suit over the $5,000 note, and thereby closed the opportunity to recover the property under the mortgage.

2. That appellant had breached its contract in failing to pay the transcript fee that accrued prior to November 1, 1894.

3. That appellee had breached its contract and increased his burden by refusing to give credit on the three notes for the $5,000 note and interest.

4. That the appellee had converted the $4,000 worth of water stock and rendered his right to subrogation hopeless. One who gives a mortgage on his seperate property as this appellant did to secure the note of another, without signing the note, is a mere surety and has all the rights of any surety. Surety is discharged when the consideration fails. The consideration for the three notes partially failed.

Brandt on Suretyship and Guaranty, Secs. 127, 415, 413.
Cooper v. Goll, 1 De Gex Fish and Jo., p. 240.

Where one gives mortgage to secure the debt of another his property is surety for that debt and whatever will discharge an individual surety will discharge the property.

Brandt on Suretyship and Guaranty, Sec. 34 and cases cited.
Allen v. Adomola, 28 Fed. 346.

A surety is a favorite of the law and the slightest fraud on the part of the creditor touching the contract, annuls it.

Magee v. Manhattan Life Ins. Co., 92 U. S., 93.
Smith v. United States, 2 Wall., 219.
United States v. Conklin, 1 Wall., 644.

Any variation in sureties contract, even for his benefit, works his discharge.

Brandt on Suretyship and Guaranty, 388 and cases cited.
Atlantic National Bank, 51 Ga., 205.

A surety can plead any defense his principal can.

Very v. Watkins, 23 How., 469.

Surety has a right to know what the contract is to which he is a party.

Eyer v. Hallier, Loyd & Gould, (Temp. Plampt) 250.

Assignment of Error No. XIII,

applies to the consideration of written contracts. It shows that part of the consideration was based on the chose in action over the $5,000 note and that suit failed by fault of appellee, which appellee acknowledged. It refused to go further with the suit, after it had been decided adversely to it in the Supreme Court (Rec. p. 131), where the appellee admitted, it refused to carry on the suit. This lost the last vestage of a chance to recover the mortgaged property, by fault of the appellee. We contend there is somthing in this contention more specially to discharge the surety relying on this contract.

The failure of consideration was set up by the surety, R. E. Daggs, in his third verified answer. It was new mat-

ter and must be replied to or it will be admitted. There was no reply to this answer of failure of consideration, hence the surety should have judgment.

Stebbens v. Leufesty, 14 Ind., 4.
Smith v. Griswold, 95 Iowa, 684.
Babcock v. Drovers' Bank, 26 Pac., 1037.

Assignment of Error No. XIV.

This assignment relates to the description of the mortgaged property given by the surety. It is contended no foreclosure can be had on this property, because the property has no status. It is a bald description. No location, no place. Description not sufficient. No county or state. The rule is: Could the sheriff locate the property? It could be guessed one place as well as another.

Nolte v. Libbert, 34 Ind., 163.

In White v. Hyatt, 40 Ind., 385, the description was as follows: "A part of the N. E. ¼ of sec. 19, township 7, range 12 east, containing 97 17-25 acres; also a part of the southwest quarter of section 18, township 7, range 12 east, containing about 33 acres, being the same lands this day deeded by the said Wyatt as executor of Thomas Davis to said White, and being more fully described in said deed."

Court said description in mortgage too indefinite.

Crosby v. Dowd, 61 Cal., 602.
Whittlesey v. Beall, 5 Blackf. (Ind.), 143.
Buck v. Axt, 85 Ind., 512.
Keys v. Lardner, 55 Kan., 331.
Clements v. Draper, 108 Ala., 211.
Bayless v. Glenn, 72 Ind., 5.
Taylor v. Hern, 131 Ind., 537.

Description insufficient.

Kemp v. Moir, 45 Ill. App., 490.
Kerr Supplement to Wiltsie on Mortgages, vol. 2, page 1200, sec. 296.
Bowen v. Wickersham, 124 Ind., 404.

The omission in the pleadings to describe the property referred to and then referring to the mortgage where such description had been scratched out is a fatal failure to describe such property and the judgment of foreclosure on such property is error.

Crosby v. Dowd, 61 Cal., 557–603.
Emerick v. Tams, 6 Cal., 155.
Hosford v. Johnson, 74 Ind., 479.

It will be observed from this record that the pleading of the appellee omits the county and state or territory where the property is located. The county and territory, as shown in the exhibit, in the original mortgage was erased with a pen by scratching continuous lines through it, which will be shown hereafter.

Assignment of Error No. XV,

relates to the right of the surety to prove his answer (Rec. pp. 8, 9, 21, 22). This refusal, appellants contend is error, the surety should have been allowed to prove the agreement on which he gave his mortgage. If that was a part of the consideration of the surety's contract, that $5,000 note should be credited if lost, and if the appellee made this agreement, the surety is not liable on his contract of suretyship. if that consideration failed.

Assignment of Error No. XVI.

This assignment relates to the mutilation and alteration of the surety mortgage. The surety did not sign the notes in suit, but gave a mortgage on his property to secure them. After the mortgage was delivered it was, by some one, presumably the appellee, scratched, as is shown in the assignment (Record, page 150). We now, for the first time, notice that a large portion of the mutilation has been omitted from the copy of the Ex. F. (Record, page 115.) It also shows that it was not filed until February 9, 1898—sixteen months after the trial took place, October 12, 1896. Neither does the Ex. F, on page 115 appear to ever had a mutilation. Should the opposition deny the certified copy of this exhibit, as it appears on page 150 of the record, or the court think the record in its present form, does not sufficiently show the point for decision, we ask the court to order the original mortgage, which is now on file in the clerk's office of the Supreme Court of Arizona, to be sent to this court, that justice may be done the appellants. We assume the same influence that mutilated and erased a part of this mortgage, is at work to keep the record from showing such mutilation.

This court will order a record sent up to this court after submission of the cause where it deems it essential to the proper disposition of the case.

Morgan v. Curtenius, 19 How., 8.

The appellant offered this mortgage in evidence at the trial. It was then and there objected to (Record, page 51,) and the objection overruled, to which exception was then and there taken and saved. The record does not show that the appellee ever proved the signature to this paper, and hence it stands on the record without any proof of who executed the paper. It never could form a

prima facie case. The judgment of foreclosure was based on that instrument. We think it improper evidence to base a judgment on. One who signs a mortgage, but not the mortgage note, his property is but surety to the note.

Brandt on Surety and Guaranty, Secs. 21 and 22 and cases.
Spear v. Ward, 20 Cal., 659.
Ross v. Allen, 141 U. S., 534.

Any act of creditor changing his liability discharges the surety.

Miligan v. Calahan, 69 Tex., 205.
Norton on Bills and Notes, 287.
Sheets v. Hinger, 10 N. Y., 539.
Goodyear v. Watson, 14 Barber, 480.
Brandt on Suretyship and Guaranty, 79.
Miller v. Stewart, 9 Wheat., 680.

Where the surety is denied the right of subrogation by conversion of the property, he is discharged by the creditor.

Hurd on Bills and Notes, Sec. 288.
Goodyear v. Barber, 14 Barber, 481.
Oldson v. Morris, 10 Johns, 539.
Brandt on Suretyship and Guaranty, 214.

Material alteration of an instrument. A mortgage that has been materially altered or multilated is but a cloud on the title of the land of the mortgagor.

Smith v. Fellows, 41 N. Y., Sup. Ct., 36.
M. Gutyer v. Velte, 133 Pa. St., 350.

Such alterations prevents a foreclosure; there is no lien.

Cutler v. Rose, 35 Iowa, 456.

Johnson v. Moore, 33 Kan., 90.
Coles v. Yorks, 28 Minn., 464.
Perea v. Federick, 17 Neb., 117.
Worring v. Smith, 2 Barb. Ct. N. Y., 119 (47 Am. D. C. 299).
Marcy v. Dunlap, 5 Lans (N. Y.), 366.
Hallingsworth v. Holbrook, 80 Iowa, 151.
Powell v. Pearlstine, 43 S. C., 403.

A material alteration of a bond after the execution, vitiates it.

Mortin v. Thomas, 24 How. (U. S.), 315.
Reese v. United States, 9 Wall., 13.
Smith v. United States, 2 Wall. (U. S.) 219.

A *fortiori* will render the mortgage here invalid and will not bind the surety. Change in the description of the property whereby its identity is changed, the identity of the subject-matter is changed or its quantity increased or diminished, is a material alteration.

In Morcy v. Dunlap, 5 Lans (N. Y.), 365, the description was changed in a mortgage where a married woman had given a mortgage on her separate property to secure the debt of her husband. Where the lot was described by the wrong number and it was changed without her knowledge. On foreclosure, the court held it vitiated the mortgage. She was a mere surety, as here R. E. Daggs, appellant, is a mere surety.

Same in Perea v. Frederick, 17 Neb. 117, an alteration of 1 and 2 to 13 and 14, held material and that vitiated the mortgage.

In Montage v. Linn, 23 Ill., 551, the figure 24 was changed to 25, was held material and vitiated mortgage. In Chasley v. Frost, 1 N. H., 145, figure 5 was changed to 15 in description, held material and vitiated mortgage.

In Sherwood v. Merritt, 83 Wis., 223, the addition of the

words " more or less " was a material alteration and vitiated the contract.

In this case these words were scratched out.

It is a principal of universal application that a material alteration of a written instrument renders it void.

Angle v. N. W. Mut. Life Ins. Co., 92 U. S., 330.
Evans v. Lawton, 34 Fed. Rep., 233.

If it avoids the instrument it discharges the surety.

Miller v. Stewart, 9 Wheat. (U. S.), 680.
Bowers v. Cobb, 31 Fed. Rep., 678.
Paine v. Jones, 76 N. Y., 274.
Edmonds v. Draper, 5 Pet. (U. S.), 624.

Burden of proving an altered instrument is on the party who brings it forward. This mortgage bears on its face a suspicious character. An erasure appears, wiping out the entire description of a part of the property assumed to be under the mortgage given by the surety. This being a surety mortgage carries a double suspicion. He has the right to stand on the very terms of his mortgage—no more, no less; no matter whether for or against his interest. It is apparent on the face of this mortgage it could not be foreclosed against this land because of no description. It is not certain where this property is. It is not certain that it was intended to be mortgaged at all. The other descriptions have the full descriptions to them. The rule in such cases in this court is that the burden is on the appellee to prove the alteration was made before it was signed.

Cox vs. Palmer, 1 McCrary (U. S.) 431.

It is the duty of the court to refuse to let the altered paper go into the evidence.

Parsons First National Bank v. Franklin, 20 Kan., 264.
Smith v. United States, 69 U. S., 219. (2 Wall. 219.)

Any unauthorized variation in an instrument a surety has signed changing his agreement will discharge the surety from his obligation.

Russell v. Payton, 4 Ill. App., 473.
Neill v. Case, 25 Kan., 510.
Stillwell v. Patton, 108 Mo., 352.
Paramore v. Lindsay, 63 Mo., 63.
Beamont v. Russell, 20 Vt., 205.
Johnson v. First National Bank, 28 Neb., 792.
Hortley v. Corby, 150 Pa. St., 23.

The one who must recover on his evidence must make out his case. If his evidence is mutilated he must explain it.

Dodge v. Haskell, 69 Me. St., 29.
Ely v. Ely, 6 Gray (Mass.), 439.
Reed v. Kemp, 16 Ill., 445.
Comstock v. Smith, 26 Mich, 306.

"A material alteration of a written contract by a party to it discharges a party who does not authorize or consent to the alteration, because it destroys the identity of the contract and substitutes a different agreement for that into which he entered."

Hersman v. Werges, 112 U. S., 141.

The burden is on him who produces a scratched instrument, where objected to, to explain it. If he proves the signature and explains the erasures he shifts the burden on to the opposition to break his *prima facie* case down. Appellee failed to do either.

Hill v. Nehus, 86 Ala., 442.
Wisdom v. Reeves, 110 Ala., 418.
McAlister v. Avery, 17 Ill. App., 568.

Assignment of Error No. XVII,

relates to testimoney introduced by the appellee over the objection of appellant under a notice marked C. H. H., copied in full in the assignment, together with the evidence contended to be prejudicial. It shows on its face the strongest evidence of its invalidity. Such a notice is no notice to produce papers.

Notwithstanding the original of duplicates was in court, (Rec. page 126) and the copy of it also (Rec. page 126). This witness under the above notice was permitted to give oral testimony contradicting both original and copy about matters in both papers (Rec. page 127). This witness then testified that the water rights had been taken in consideration of the three notes (Rec. page 126), and said "and the bank agreed to give them back everything that they at that time held and took those three notes with the water rights in consideration of it." This is an appalling statement in view of the written contract (Rec. p. 69, and p. 104, and p. 57), where the other counsel for the appellee, Mr. Ives in Mr. Chalmers presence said: "There is an answer here and under the answer of A. J. Daggs, it is to the effect that we have converted these water rights. We are ready to deposit these with the clerk, and after our notes are paid and satisfied they may be delivered. If not satisfactory, that they may be returned to us. We make this offer in order to do away with the allegation of conversion." He could not have taken the water rights in consideration of the three notes when the contracts say on their face they sold the $5,000 note and litigation, and

the overdraft and collateral attached to it, and in selling the overdraft and collateral they say they sold it without recourse on it to the Phœnix National Bank.

We contend most seriously that the giving of that notice was only a subterfuge to go behind to let the witness testify false before the court. The witness had the copy of the contract and the original of the duplicates there. It requires no notice to produce, to introduce one of the duplicates. Under such a notice over objection it is error to allow such evidence admitted.

Thompson on Trials, 750, 759, 760, 780.
Alney v. Halcliff, 37 Hun. (N. Y.), 286.
Revised Statutes of Arizona, Par. 1861.

"Sec. 37. Any court in which an action is pending, or a judge thereof, may upon notice, order either party to give to the other within a specified time, an inspection and copy, a permission to take a copy, of any book, document or paper in his possession or under his control, containing evidence relating to the merits of the action, or defense therein. If compliance with the order be refused, the court may exclude the book, document or paper from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing, for contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers or documents when he is examined as a witness."

Assignment of Error No. XVIII

relates to the proceeding of the district court in proceeding with the trial over objection, on the ground that as to appellant A. J. Daggs, there was no issue, for the

reason there was no pleadings on the part of the plaintiff, no reply to raise an issue to be tried.

The objections were made throughout to the entire second trial (beginning on Record pp. 120, 122, 125, 131) and exceptions taken at the time of the overruling of the same. Appellant contends under the pleadings there was no issue, and hence this entire second trial was an error, there being no issue under the pleadings to be tried.

"Where the ultimate fact is admitted on the record, probative facts tending to establish, modify, or overcome it, are not the proper subject of judicial action." Rhodes, J., in

Mulford v. Estidillo, 32 Cal., 139.
Johnsons Bliss on Code Pleading, 397.
Camp v. Lassen, 67 Cal., 139, 599.

The authorities cited under Assignments IV, VIII, and IX, sustain this view, that the facts being admitted by the pleadings, there was nothing to be tried, no issue, which view appellant held and still maintains and contends for.

Assignment of Errors, No. XIX, XX, XXI, argued together.

These three assignments relate to the statement of facts, as required on appeals by 18 Stat. at Large, p. 27, being Act of Congress, April 7, 1874, Chap. 80, being 1 Sup. R. S., 13, being Organic, Act Arizona Territory, Sec. 1868.

The Honorable Court refused appellants application by mandamus to have the court below make another statement of facts, than the one that appears in Rec. p. 158. The question is upon that statement of facts. Does it sus-

tain the judgment of the court below? Appellee sued on three promissory notes. The statement of facts does not mention the three notes, the interest, the mortgage, nor any fact connected therewith. The appellants sued on three counterclaims, and failure of consideration by the surety; not one of these are mentioned or any fact connected therewith. Although 55 pages of oral testimony appears in the case, not one ultimate fact out of it is mentioned in the whole so-called statement of facts.

We submit such a statement is not a statement of facts and will not sustain any judgment.

The findings should cover the essential facts upon which must exist and concur to constitute a right of action.

Smith v. Sac County, 11 Wall., 139, 428.
Copeland v. Ins. Co., 9 Wall., 461.
Ins. Co. v. Tweed, 7 Wall., 44, reading p. 51.
Edington v. Richardson, 10 Wall., 516.
Norris v. Jackson, 9 Wall., 125.
Flounders v. Tweed, 9 Wall., 425.
Jenison v. Lenard, 21 Wall., 302.
Melendy v. Rice, 94 U. S., 796.
Gillman v. Ill. M. T. Co., 91 U. S., 603.

This statement of facts is not even a mere recital of the evidence. It does not approximate to a statement of facts in any particular.

Lehren v. Dickson, 148 U. S., 71.

The only way to show a finding of facts is not a finding, is to show an affirmative.

To brief a negative can only be done by showing an affirmative ought to appear.

The opinion of the lower court assigning reasons for its conclusions cannot be treated as a findings of fact.

British Queen Mining Company v. Baker Silver Mining Company, 139 U. S., 222.

Opinion cannot be resorted to to help the findings of facts.

Saltonstall v. Birtwell, 150 U. S., 417.

If there were findings in the district court, adopted by the lower court it might be resorted to, but there is none. There is nothing to show the judgment of the lower court was right. The record shows the judgment wrong.

Watch Mining Company v. Crescent Mining Company, 148 U. S., 293.

Where there are no facts stated by the lower court in its statement of facts, nothing is offered to sustain the judgment.

Young v. Amy, 171 U. S., 179.

Court will review findings of facts with exceptions, to see if it supports the judgment.

Seeberger v. Schlesinger, 152 U. S., 581-586.
Allen v. St. Louis Bank, 120 U. S., 20-30.
Insurance Company v. Born, 95 U. S., 117-125.
Tyng v. Grinnell, 92 U. S., 467-469.
St. Louis v. Ferry Company, 11 Wallace 423-428.

Upon an appeal from a Territorial court, the United States court will decide whether the judgment or decree is supported by the facts as found by the court, and upon admission or rejection of evidence where *exception* is taken. It cannot in such case consider the weight of the evidence, nor its sufficiency to support the findings of the court.

Idaho & O. Land Co., v. Bradbury, 132 U. S., 509.
San Pedro, etc., Co., v. U. S., 146 Id., 120.
Smith v. Cole, 144 Id., 509.
Haws v. Victoira Copper Co., 160 Id., 303.
Gildersleeve v. New Mex. Min. Co., 161 Id., 303.

Same rule applies where jury is waived and court tries cause.

Mammoth Min. Co. v. Salt Lake Machine Co., 151 U. S., 447.
Grayson v. Lynch, 163 Id., 468.

This court will review the objections when exceptions are duly taken to see if the findings of facts are based on the illegal rulings, injurious to the appellant.

Young v. Amy, 171 U. S., 179.
Mining Co. v. Taylor, 100 U. S., 37, 42.
Home Ins. Co. v. Balt. Warehouse Co., 93 U. S., 527, 547.
Railroad Co. v. Pratt, 22 Wall., 123.
Packet Co. v. Clough, 20 Wall., 528, 542–3.

This court will examine the evidence at large to see whether the objections and exceptions are well taken at the trial under the theory of the pleadings.

Smith v. Sac. Co., 11 Wall., 139, *supra.*
Mammoth Mining Co. v. Salt Lake Foundry Co., 151 U. S., 447.
Runkle v. Brougham, 153 U. S., 216, reading page, 222.
Haws v. Victoria Mining Co., 160 U. S., 303.

In Glendersleeve v. New Mex. Mining Co., 163 U. S., 109, reading page 118, this court said: "It has been frequently held that the authority of this court on appeals is limited to determining whether the court's findings of

facts support its judgment or decree, and whether there is any error in rulings duly excepted to in the admission and rejection of evidence."

Harrison v. Perea, 168 U. S., 311.

Conclusion.

We ask the court to examine the whole case and give us judgment according to the law and the right of the case.

Respectfully submitted,

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